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IN THE

Supreme Court of the United States

ROBERT H. HOFFMANN, HEIDEMARIE KRÜGER, SUSANNE HUSTÄDT, ESTATE OF HENRIETTE HOFFMANN VON SCHIRACH, DR. KLAUS VON SCHIRACH, EXECUTOR, and BILLY F. PRICE,

Petitioners,

v.

UNITED STATES and JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a friendly non-resident alien whose government is not at war with the United States has the same rights as a citizen to compensation when his property in the United States is taken by the United States Government for public use, as this Court held in *Guessefeldt v. McGrath* and *Russian Volunteer Fleet v. United States*, or whether those cases implicitly have been reversed, as the Federal Circuit held, by later decisions of this Court that require a non-resident alien to have a "substantial connection" with the United States to be entitled to other constitutional rights?

2. Whether location of a friendly non-resident alien's property in the United States constitutes a "substantial connection" with the United States, thereby invoking the compensation requirement of the Fifth Amendment when the United States Government takes the property for public use?

3. Whether 400-year-old Anglo-American law that no statute of limitations exists as between a thief and his victim in litigation over the stolen property still possessed by the thief, applies in litigation concerning German private property confiscated by the United States Government in violation of applicable treaties in circumstances amounting to theft?

4. Whether Fifth Amendment due process mandates application of a discovery rule in the following circumstances: the United States Government seized privately owned chattels in Germany in 1950 for use, under the Hague Treaty which obligated the United States Government to return the property and pay compensation for the use; the United States then transported the property to the United States for use, and in 1951, confiscated the privately-owned German chattels in the United States, invoking a statute which expired in 1946. The German

property owner had no knowledge of this illegal confiscation until 1989, because the United States gave no notice other than by publication in the *Federal Register* (which notice, by statute, is valid only as to residents of the United States), despite knowledge of the German owner's name and address?

5. Whether the Federal Circuit denied due process to a plaintiff by denying the right to an appeal from a final judgment against him when the plaintiff was ordered dismissed in one district, and the case was that day transferred to another district which later entered the final judgment against the plaintiff based upon the dismissal order of the transferor court?

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Petitioners Robert H. Hoffmann, Heidemarie Krüger, Susanne Hustädt, Estate of Henriette Hoffmann von Schirach, Dr. Klaus von Schirach, Executor, and Billy F. Price respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS AND ORDERS ENTERED IN THE CASE

The opinion of the court of appeals on cross-petitions for rehearing is unpublished; the text is reproduced in Appendix A. The original opinion of the court of appeals is also unpublished; the text is reproduced in Appendix B. The opinion of the District of Columbia District Court is reported at 53 F. Supp.2d 483 (D.D.C. 1999); that opinion and the judgment entered by the district court are reproduced at Appendices C and D. The opinion dismissing Price as a plaintiff in the Southern District of Texas is not officially reported; that opinion and the order transferring the case to the District of Columbia District Court are reproduced at Appendices E and F.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on August 16, 2001, and denied cross-petitions for rehearing on November 6, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, TREATIES AND STATUTES INVOLVED

The pertinent provisions of the following constitutional provision, statutes, conventions and presidential message are set forth in Appendix G:

The U.S. Constitution, Fifth Amendment (58a);

Title 28, Judiciary and Judicial Procedure, 28 U.S.C. §§ 1331, 1346(a)(2), 1346(b)(1), and 1367(a) (58a-60a);

Title 31, Money and Finance, 31 U.S.C. § 3727(a) and (b) (60a-61a);

Title 44, Public Printing and Documents, 44 U.S.C. § 1508 (61a-62a);

The Annex, Hague Convention (IV) Regulations Respecting the Laws and Customs of War on Land (63a-65a);

The Rules of Land Warfare, FM-27-10, issued by the United States War Department in 1940 (66a-69a);

The international law provisions from the Dep't of the Army, Int'l Law Vol. II, Pamphlet 27-161-2 (1962) (70a-83a);

President Truman's message of July 9, 1951 (1951 U.S.C.C.A.N. 2358-2359) (84a-85a).

STATEMENT OF THE CASE

While there are three civil actions involved in this case, the record consists of records in five civil actions.[1] Before the 1989 Case and the 1997 Case were transferred by the Texas District Court to the D.C. District Court (and became the 1998 Case in that court), Price was awarded a Federal Tort Claims Act ("FTCA") judgment for damages of $7,949,908 in the 1983 Case, involving the 2,500,000 Hoffmann photographs ("Photographs") and the four

1. The record consists of the records in C.A. H-82-3712 ("1982 Perpetuation of Testimony Case"), C.A. H-83-4969 ("1983 Case"), C.A. H-89-815 ("1989 Case") and C.A. H-97-453 ("1997 Case"), all from the Southern District of Texas, together with the record in 98-CV-857 ("1998 Case") from the D.C. District Court.

watercolors at issue here. *See Price v. United States*, 707 F. Supp. 1465 (S.D.Tex. 1989). Upon the Government's appeal of the judgment in the 1983 Case, in 1995 the Fifth Circuit reversed the FTCA judgment as to the Photographs, holding that the Texas District Court never acquired subject matter jurisdiction because the FTCA suits were filed prematurely.[2] The Fifth Circuit also stated that the Texas District Court had no subject matter jurisdiction as to the Nürnberg Photographs described in a 1951 "vesting order," because there can be no FTCA jurisdiction when the Trading With the Enemy Act ("TWEA") is involved. Finally, the Fifth Circuit held that the Texas District Court never had subject matter jurisdiction over the watercolors because there is no FTCA jurisdiction when a tort claim arises in a foreign country. 69 F.3d 46 (5th Cir. 1995), *modified on rehearing*, 81 F.3d 520 (5th Cir. 1996), *cert. denied*, 519 U.S. 927 (1996).

Six years before the Fifth Circuit's ruling, Price and alternatively the vendors to him of the Photographs and the four watercolors (the "German Plaintiffs") filed a second suit (the 1989 Case) to cure the defense of premature filing of the 1983 Case as to the Photographs. Price and alternatively the German Plaintiffs filed the 1997 Case upon learning facts belatedly furnished by the Government in 1996, in response to discovery efforts filed many years earlier.

After consolidation of the 1989 and 1997 Cases, the Texas District Court ordered further consolidation of the records in the 1983 Case and the 1982 Perpetuation of Testimony Case. Defendants then renewed their Motion to Dismiss and for Summary Judgment, and Plaintiffs filed a Motion for Summary Judgment.

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2. Government counsel requested the early filing of the amended complaint, agreeing not to raise the early filing issue, in order to consolidate all issues immediately in one case. Six years later, subsequent government counsel reneged.

On March 24, 1998, the Texas District Court published an opinion holding that Price had no standing to sue the Government as to the Photographs and watercolors because his acquisition of ownership violated the Anti-Assignment Act, which precludes an assignee of unliquidated claims from suing the United States. (Appendix E, pp. 52a, 53a-55a and Appendix G, p. 60a.) That court denied the Government's Motion to Dismiss and for Summary Judgment and Plaintiffs' Motion for Summary Judgment and ordered that Price be dismissed from the case. The court then transferred all cases to the D.C. District Court because venue was improper in Texas with only foreign plaintiffs remaining. (Appendix E, p. 55a, and Appendix F, p. 57a.)

That same day the Texas District Court records were shipped to the D.C. District Court. Records in the four cases were received in the D.C. District Court on March 31, 1998, and the 1998 Case commenced that date. Plaintiffs received notification of the March 24, 1998 order of dismissal of Price and transfer to the D.C. District Court by mail several days later. On April 1, 1998, Plaintiffs filed, in the Texas District Court, a Motion for Entry of Judgment against Price under Rule 54(b), and simultaneously another motion to stay all proceedings pending Price's appeal from that Rule 54(b) judgment. The Government did not oppose the entry of judgment but opposed the stay. On April 24, 1998, the Texas District Court denied the Motion for Entry of Judgment.

After the case was transferred to the D.C. District Court, the Government renewed its motion to dismiss and for summary judgment and Plaintiffs opposed. In June 1999, without oral argument, the D.C. District Court published an Opinion granting the Government's motions. (Appendix C, pp. 23a-49a.)[3] On September 9, 1999 the D.C. District Court entered its Final Judgment dismissing the consolidated

3. Reported at 53 F. Supp.2d 483.

complaint of Price and the German Plaintiffs. (Appendix D, pp. 50a-51a.) No final judgment was ever entered as to Price except the judgment of September 9, 1999. Price's appeal to the Federal Circuit involves only Price's dismissal as a plaintiff by the Texas District Court. (*See* Reasons for Granting the Writ, Point IV at p. 25.) Appeals by the German Plaintiffs to the Federal Circuit address the merits of all other issues. The Federal Circuit had jurisdiction over all of the issues in the case because the D.C. District Court had jurisdiction under 28 U.S.C. § 1346(a)(2) (the "Little Tucker Act"), and the Federal Circuit had exclusive jurisdiction of appeals of Little Tucker Act issues under 28 U.S.C. § 1295(a)(2). Because of its Little Tucker Act jurisdiction the Federal Circuit had jurisdiction over all other issues in the case. *United States v. Hohri*, 482 U.S. 64, 75-76 (1987).

This is a summary judgment case in which only the Government moved for summary judgment; consequently, all facts Plaintiffs presented to the D.C. District Court are treated as true, and all inferences are resolved in Plaintiffs' favor. Those facts are briefly summarized as follows:

A. *Facts about the Photographs*.

On his 21st birthday, in 1937, Hoffmann Jr. received a gift of the 2.5 million Photographs then in the archive being used in the family photo business, comparable in size to AP and UPI. Hoffmann Jr. and his father continued to operate the business through World War II. Their Photographs were published in the United States and worldwide, before and during World War II. Due to Hoffmann Jr.'s father's amicable relationship with Hitler, the Hoffmann firm obtained thousands of photographs of Hitler and the German and Nazi personalities of those times. Months before the battles on German soil began, Hoffmann Jr. stored most of the Photographs in a castle ("Winhöring Photographs"). After cessation of hostilities, the United States Army

("Army") found the Winhöring Photographs when it requisitioned the castle as an officers' billet, and in June 1945, all of the Winhöring Photographs were shipped by the Army to "higher headquarters," arriving in June in the Army's Freising Intelligence Center, where Photographs gathered by the Army at other sites were already being stored. The Photographs were picked over and divided by the O.S.S., intelligence agencies, and the War Crimes Commission. A portion of the Winhöring Photographs was ultimately sent by the Army to Nürnberg for use as photographic evidence by the War Crimes Commission ("Nürnberg Photographs"). The Army took the balance of the Photographs to the United States.

Hoffmann Jr. and his father were arrested in May 1945 by the Army and sent to Nürnberg to manage the Nürnberg Photographs. The father was turned over to the German civil government in 1946 and was held in jail until mid-1950. Hoffmann Jr. was kept under arrest at Nürnberg, as a paid employee of the Army, working with the Nürnberg Photographs until the prosecutions ended in 1949. As a consequence, neither Hoffmann had knowledge of what happened to the Photographs other than the Nürnberg Photographs until 1996, when discovery in this case resulted in disclosure by the Government about the Photographs at Freising and those taken under control by the Army in Bavaria and Berlin.

Hoffmann Jr. was adjudicated "uninvolved" in the Nazi war effort by a postwar German court. His father was determined to be a war "profiteer" and was sentenced to forfeit a specific list of assets, which did not include the Photographs or his personally-owned artwork.

During 1946-1949, Hoffmann Jr. was repeatedly assured by his employer – the commander of the Army contingent at Nürnberg – that the Army knew that the Nürnberg Photographs belonged to him, and that such Photographs

would be returned to him when the prosecutions concluded. Nevertheless, the Army Historical Division in the United States, to "obtain a collection of well-known photographic negatives," in 1949 ordered a search in Europe for negatives of the Photographs. The Army Historical Division in Europe located the Nürnberg Photographs but no negatives. The Army in the United States commanded that the Nürnberg Photographs be brought to the United States for use in writing books about World War II. Hoffmann Jr. was advised by personnel in command of the Army Historical Division in Europe that the Army had a continuing need to use the Nürnberg Photographs and when the Army's books were concluded, his Nürnberg Photographs, by treaty, had to be returned to him. Hoffmann Jr. protested the Army's seizure and shipment of the Nürnberg Photographs to the United States, asserting that no other private photo archives were being taken.

Under the Hague Convention (IV) Regulations ("Hague Treaties"),[4] the Army is prohibited from *confiscating* chattels belonging to German citizens, but had the full right, during and after World War II, to *take control over* or *seize* chattels belonging to German citizens. (Appendix G, pp. 70a, 73a-83a.) Pursuant to lawful *seizures*, under the Hague Treaties, the Army could and then did transport Hoffmann Jr.'s Nürnberg Photographs to the United States. Having made seizures, there are concomitant obligations on the Army, imposed by the Hague Treaties, of accounting for, returning and compensating the owners. The Army initially recognized these obligations, then reversed course. Thus, in reviewing Hoffmann Jr.'s protest, Army personnel determined:

- the Army initially took lawful control and custody in 1945, pursuant to the Hague Treaties; those

4. That treaty has the force and effect of a statute adopted and signed by the President. U.S. CONST. art. 6; *Valentine v. United States*, 299 U.S. 5, 10 (1936). *See* Appendix G, pp. 63a-65a.

Treaties required the Army to return the Photographs to Hoffmann Jr.

- in 1950, the Army lawfully seized the Nürnberg Photographs pursuant to the same Treaties and lawfully brought them to the United States.

- even though the Nürnberg Photographs were lawfully seized, under the Hague Treaties the Army did not own the Photographs, and owed Hoffmann Jr. the obligations of return and compensation.

Unable to contradict the clear title that Hoffmann Jr. had to the Nürnberg Photographs, and recognizing that third-party users would have copyright problems, the Army recommended that copyrights to the Nürnberg Photographs be "cleared through the Custodian of Alien Property." In 1951, an Army general and a group of unknown others, specifically to impede any efforts by Hoffmann Jr. to ever regain his Nürnberg Photographs, concocted a plan to obtain bogus paper title to the Nürnberg Photographs by obtaining a "vesting order" under provisions of the TWEA that had lapsed in 1946.

In so proceeding, Government employees and others unknown conspired to commit a knowing act of theft: the Government's TWEA power to vest privately-owned German tangible property not located inside the United States on and prior to December 31, 1946, terminated by presidential proclamation on December 31, 1946. The TWEA was inapplicable to tangible property, owned by Germans, brought to the United States for the first time after December 31, 1946. (Appendix G, pp. 84a-85a.)

The Army personnel involved must have believed their theft of the Nürnberg Photographs would never become an issue: Hoffmann Jr. was in Germany with limited funds, no

command of the English language, and no way to trace what happened. The Alien Property Custodian's minimum obligation as to tangible property in the United States seized prior to 1947, when the TWEA was in effect and authorized seizures, had been, as to property owners *residing in the United States*, at least to publish the "vesting order" in the *Federal Register*. In an effort to color the 1951 "vesting order" with a smattering of authenticity, it was duly published in the *Federal Register* that year.[5] Clearly, the English-language *Federal Register* was never going to come into the hands of Hoffmann Jr. in Germany (who could not read English in any event), and Mr. Green of the Alien Property Custodian's office saw that no other notice was given to Hoffmann Jr. because he papered the file with statements such as, "There are no known valid non-enemy interests in the property which would be affected by the proposed vesting order," notwithstanding the substantial evidence in the file showing that the Nürnberg Photographs belonged to Hoffmann Jr. and the fact that Hoffman Jr. was not an "enemy" within the meaning of the TWEA at the time the vesting order was entered. The Army's file (discovered in 1989) reveals that the "vesting order" was being obtained solely to "strengthen the Army's legal hold" on the Nürnberg Photographs.

Hoffmann Jr. was given no actual notice of entry of the "vesting order" until 1989. Until after 1983, when he and Price requested that all Photographs be turned over to them, Hoffmann Jr. believed that the Army continued to recognize his ownership of the Photographs.

B. ***Facts About the Four Watercolors.***

The four watercolors were painted by Hitler before and during World War I and were the private property of Hoffmann before 1941. The watercolors along with

5. Because of the foregoing factual circumstances, the "vesting order" was termed an "order of theft" by the Texas District Court.

Hoffmann's substantial art collection were stored in a second castle, Schloss Dietramszell, with art collections of several German museums. When the Army requisitioned that castle as an officer billet, the Army discovered the thousands of paintings, took control over them and shipped them to the Munich Collection Point to permit cataloging of the artworks, advertising their location, and returning them to their owners upon presentation of proof of ownership. Because of the situation, under the Hague Treaties, the Army was in lawful possession of all of these works of art. Through this process the Army became agent for the unknown owners, and an express bailment was created. In addition, because the four watercolors were not state-owned property, but rather were private property of an individual German, the Hague Treaties precluded confiscation and imposed affirmative duties on the Army to return the four watercolors to their true owners and pay those owners compensation for any military use. (Appendix G, pp. 63a, 65a, 72a-75a.)

From 1945 until mid-1950 Hoffmann, jailed as a "profiteer," was unable to appear and claim his art collection (although his son Hoffmann Jr. appeared, made claims for paintings that belonged to himself, and obtained turnover of those paintings). When the Munich Collection Point was closed in 1949, the Army shipped all unclaimed art works to the Wiesbaden Collection Point to be turned over to the new German civil government, to continue the return process. In 1950, the commander of the Army's European contingent of the Historical Division toured the Wiesbaden Collection Point and "picked up" the four Hitler watercolors for "addition to the Army's collection." The four watercolors were then seized by the Army under the Hague Treaties and shipped to Alexandria, Virginia in 1950. (*See* Appendix G, pp. 73a-75a.)

The Army has no claim of ownership to the four watercolors under any theory. Rather, the Army remained

merely a lawful possessor with the same duties under the Hague Convention (IV) Regulations, Articles 46, 23(g), 53 and 56 and the law of agency and bailment that it had as to the Photographs.

When Hoffmann was released from prison in 1950, his art collection was gone, and he had no knowledge of what had happened to it. When Hoffmann died, his daughter von Schirach inherited his four watercolors and any interest he had in the Photographs. In 1964, she wrote to the United States Government (in German) asking whether it had possession of the watercolors; the Government replied that it did not have the watercolors, despite the fact that the four watercolors (with no owner identified) were then in the possession of the Army Historical Division.

Incident to writing a book, Price read the Army Historical Division's elaborate brochure about the four Hitler watercolors and obtained permission from the Historical Division to publish photographs of the watercolors in his book. Price at that time noted that the Army's records showed that it had no knowledge of who owned the watercolors.

In 1982, Price's book research led him to von Schirach. When Price showed her the photos of the Army watercolors, she discovered for the first time that the watercolors she had previously questioned the Government about – which she had inherited in 1957 from her father – were indeed in the possession of the United States. Because of her poor health and lack of funds, von Schirach conveyed *ownership* of the watercolors to Price, who agreed to obtain the watercolors from the Army.

In response to later written demands from Price and von Schirach, in 1983 the Army refused to surrender possession of the watercolors. When Price was in Munich in connection with depositions concerning the watercolors, he met

Hoffmann Jr., who conveyed *ownership* of all of the Photographs to Price. Price and Hoffmann Jr. later made written demands on the Army, other relevant Government agencies, and the Alien Property Custodian, all of whom refused to relinquish the Photographs.

All appropriate administrative claims were filed, and in 1989, suit was timely instituted. Discovery efforts showed (in 1996) the 1951 conspiracy to vest title to the Nürnberg Photographs in the Alien Property Custodian using a statute that lapsed in 1946, and ignoring all required notice to the known true owner. A second suit was filed in 1997, and the consolidated cases asked for the following relief:

- Injunctions ordering return of the watercolors and Photographs;

- Little Tucker Act damages of $10,000 per painting for the four watercolors, or $9,000 as a group, upon theories of Fifth Amendment Wrongful Taking, Treaty obligations, and bailment contract;

- Little Tucker Act damages of an average of $21.20 each for the 2.5 million Photographs (approximately $53.8 million) upon theories of Fifth Amendment Wrongful Taking, Treaty obligations, and bailment contract;

- FTCA damages for the tort of conspiracy that occurred prior to the signing of the vesting order, and fraudulent concealment thereof until 1996;

- FTCA damages for conversions in 1983 and 1996 when the Government refused to return the 2.5 million Photographs;

- Under the TWEA for return of the Nürnberg Photographs and damages.

REASONS FOR GRANTING THE WRIT

This case involves one of the thousands of thefts of valuable artworks in Europe incident to World War II. The unique aspect of this theft is that the culprit is the United States Government.

In permitting the United States to retain the fruits of it crimes, the Federal Circuit denied basic constitutional rights to the German Plaintiffs and to Price, and ignored 400 year old basic procedural law. That court held that no friendly non-resident aliens (the German Plaintiffs in this case) have standing to complain under the Fifth Amendment for the United States' wrongful taking without any compensation of their property in the United States. In so holding, the Federal Circuit ignored two contrary opinions of this Court directly in point and held that such opinions had been implicitly reversed by a third opinion dealing with an illegal search and seizure (by United States' standards) of evidence in an alien Mexican defendant's house in Mexico.

In its motion to the Federal Circuit for that Court to publish its opinion in the instant case, the Government characterized the Federal Circuit's opinion as applying to a board spectrum of cases in which non-resident aliens seek to challenge actions of the Government and stated "as such it has broad precedential importance." Denial of Fifth Amendment wrongful taking rights to friendly non-resident aliens with respect to their United States-situs property is of enormous importance in the administration of justice in general, and in the instant case has deprived the German Plaintiffs of in excess of $15,000,000 of property.

As the United States goes forward with worldwide public condemnation of criminal thefts of art treasures incident to war, and resultant prosecutions of its own citizens for pillaging and trading in pillaged artworks, it must act

consistently and with a solid legal foundation. It cannot do so if the judicial branch – the ultimate check on executive misconduct – shields the Government's illegal and unconstitutional behavior.

I.

THE FEDERAL CIRCUIT'S HOLDING IS DIRECTLY CONTRARY TO TWO CASES FROM THIS COURT THAT HOLD THAT NON-RESIDENT ALIENS WHOSE GOVERNMENTS ARE NOT AT WAR WITH THE UNITED STATES HAVE THE SAME FIFTH AMENDMENT RIGHTS AGAINST WRONGFUL TAKING OF THEIR UNITED STATES SITUS PROPERTY AND THE SAME RIGHTS TO DUE PROCESS WITH RESPECT TO SUCH PROPERTY AS UNITED STATES CITIZENS

Holding that the Fifth Amendment wrongful taking provision extends to aliens only "when they have come within the territory of the United States and developed substantial connections with this country," *citing United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990), the Federal Circuit, after ignoring the basic law that no statute of limitations exists in litigation over stolen property between the thief and his victim (Point II, *infra*) held that Plaintiffs "have failed to establish 'substantial connections' to the United States" so as to entitle them to claim protection of the Fifth Amendment's wrongful taking clause. That holding disregards the fact that the issue here is a property issue, not a personal rights issue, and that the German Plaintiffs' properties had the only contact necessary as to property: it was physically in the United States, having been brought into the United States by the Army.

The cases relied upon by the Federal Circuit address entitlement to personal constitutional privileges. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (in a suppression of evidence context, the issue was whether a Mexican had a right to be free from illegal search and seizure in Mexico); *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (*habeas corpus* rights of German soldiers in Germany). It makes eminent sense that application of such personal privileges should not be given effect outside the confines of the United States: to rule otherwise would be to require the United States to enforce its laws in foreign countries. Thus, those personal constitutional privileges are inapplicable if the alien is not physically within the United States at the time he is deprived of personal constitutional rights or privileges.

That rationale has no application to property that is physically located within the United States, especially when the Government has brought the property into the United States and then converts the property in the United States. For that reason, the only cases from this Court that have examined the Fifth Amendment in the context of non-resident alien-owned property physically located in the United States have given full protection of the Takings Clause to that property. For example, in *Guessefeldt v. McGrath*, 342 U.S. 308, 318 (1952), a German national sought return of his property under the TWEA. Although the question there was whether the German could be independently viewed as "friendly" to the United States even though by statute he was deemed an "enemy" because his country was at war with the United States, this Court, in reviewing the property issues, stated, "It is clear too that friendly aliens are protected by the Fifth Amendment requirement of just compensation."

The case cited by this Court in *Guessefeldt v. McGrath* was *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931). In that case, a Russian corporation with no place of

business in or other contacts with the United States purchased from an assignee contracts for the construction of two ships in New York. During World War I, the Government, acting under authority of the United States Shipping Board Emergency Fleet Corporation, requisitioned the contracts and the ships being constructed thereunder for the benefit of the United States. The Government thereafter sought to avoid payment for the ships by urging that the United States had not then recognized the Union of Soviet Socialist Republics and thus the alien corporation had no right to sue in the United States. In rejecting this argument, this Court said (282 U.S. at 489):

> [T]he petitioner is a corporation duly organized under the laws of Russia. . . . There was no legislation which prevented it from acquiring and holding the property in question. The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution. *Wong Wing v. United States*, 163 U.S. 228, 238; compare *Yick Wo v. Hopkins*, 118 U.S. 356, 369; *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394, 396; *Truax v. Raich*, 239 U.S. 33, 39; *Terrace v. Thompson*, 263 U.S. 197, 216; *Home Insurance Co. v. Dick*, 281 U.S. 397, 411. Exerting by its authorized agent the power of eminent domain in taking the petitioner's property, the United States became bound to pay just compensation. . . .

The cases relied upon by this Court in *Russian Volunteer Fleet*, which generally extended constitutional protections to aliens physically in the United States, have been construed by later cases as being inapplicable to aliens not within the physical confines of the United States. *E.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990). This court has *never* limited the application of the Fifth Amendment takings

clause to foreign-owned property located in the United States, and *Russian Volunteer Fleet* remains good law today.

In the instant case, the German Plaintiffs' Nürnberg Photographs were brought to the United States by the Army over assurances given by ranking United States Army officers that, under the Hague Treaties, the properties would be returned to Hoffmann Jr. after the Government's use was concluded. The Army brought the rest of the Photographs and the watercolors to the United States, with no knowledge of who owned those properties. All of the Photographs and the watercolors were physically in the United States when the Government asserted that it, rather than the German Plaintiffs, owned the properties and the Federal Circuit held that the German Plaintiffs have no Fifth Amendment wrongful taking rights. The German Plaintiffs' contacts with the United States are sufficient to invoke the teachings of *Guessefeldt v. McGrath* and *Russian Volunteer Fleet.*

II.

THE COURT OF APPEALS IGNORED A FOUR HUNDRED-YEAR-OLD TENET OF ANGLO-AMERICAN LAW – THAT A STATUTE OF LIMITATIONS DOES NOT EXIST WHEN A THIEF IS IN LITIGATION OVER THE STOLEN PROPERTY WITH HIS VICTIM

The judgment of the Federal Circuit permits the United States to ignore the Hague Treaties governing the conduct of the Army during a military action, here, World War II. Under the Hague Treaties' obligations, during the occupation of Germany, private property could neither be destroyed nor confiscated by the Army, but could be seized for the Army's use. However, such seizure required return of the property,

and compensation.[6] The only exception to that no-confiscation rule existed in circumstances where the Hague Treaties did not apply – when German tangible property was physically in the United States before December 31, 1946. (Appendix G, pp. 84a-85a.) The Army abrogated these rules in this case by first lawfully (under the Hague Treaties) seizing the privately owned German property in Europe in 1950 (the Nürnberg Photographs), lawfully (under the Hague Treaties) bringing that property to the United States in 1951, and then in violation of the Hague Treaties, confiscating the property in the United States using a law that expired December 31, 1946, to enter a "vesting order" under that law (the TWEA). (Appendix G, pp. 84a-85a.) The United States thus did indirectly what the Hague Treaties precluded it from doing directly. The confiscation of the Nürnberg Photographs was effected in 1951 and was camouflaged by using a statutory "vesting order" mechanism that expired in 1946.[7] That illegal confiscation casts the Government as a thief with respect to the Nürnberg Photographs.

The Federal Circuit ignored the facts of the theft – which are uncontroverted by the Government – and the legal ramifications of that theft, and concerned itself with statute of limitations issues in cases other than those involving a claim against a thief by his victim over the stolen property.[8]

6. Appendix G, pp. 70a, 72a-82a.

7. A general in an administrative unit of the Army actually wrote a memorandum that the "vesting order" was being sought "to strengthen the Army's legal hold" on the Nürnberg Photographs.

8. Such process has enabled the courts below to script opinions to fault Plaintiffs (1) for failing to contest, by 1953, entry of a vesting order with respect to the Nürnberg Photographs, that was not disclosed to the German-property owner in Germany until 1989, (2) for failing to prove that the Government acted as a fiduciary with respect to the watercolors, and (3) ultimately, for failing to acquire a

(Cont'd)

In such cases, when the thief is caught with the stolen property, as between the thief and the owner of the stolen property, no statute of limitations exists, and thus no bar to suit ever exists as between those parties.

This rule has existed in Anglo-American law since before the days of Blackstone and has equal vigor today. 3 WILLIAM BLACKSTONE, COMMENTARIES 145-166; *O'Keeffe v. Snyder*, 83 N.J. 478, 416 A.2d 862 (1980); *Menzel v. List*, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *aff'd as modified*, 279 N.Y.S.2d 608 (App. Div. 1967) (per curiam), *third party claim rev'd on other grounds*, 24 N.Y.2d 91, 246 N.E.2d 742 (1969); discussion in HAWKLAND, UNIFORM COMMERCIAL CODE SERIES §§ 2-403:01, 2-403:04, 2-403:05 (1999); Note, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431, 1445 (1992).

Possession by the United States in Europe of all of the Photographs from early in May 1945, later seizure and use of those Photographs, and then their transportation to the United States for further use, started no statute of limitations because the possession, seizure and transportation were lawful under the Hague Treaties. (*See* Appendix G, pp. 64a-65a and pp. 73a-82a.) The seizures of the Photographs justify and allow possession for as long as the Government needs to use the chattels, in Europe or in the United States. If the property owner asks the Government for return and the Government refuses, the Government in effect is simply responding that its use of the chattels is not over. Lawful possession continues. The important legal point is that under no circumstances can the Government acquire title or

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(Cont'd)
physical presence in the United States, which the court deemed a prerequisite for the German Plaintiffs to raise Fifth Amendment wrongful taking claims. *See* Point I.

ownership through some statute of limitations concept during its possession pursuant to seizure under the Hague Treaties.

For this reason, the Federal Circuit erroneously faulted Plaintiffs for failing to prove that the Army acted as a fiduciary; such a concept is not an exception to the Hague Treaties, the statute proscribing Army confiscation of German private property but permitting the Army to seize that private property for use.

The court of appeals has turned a blind eye to the 400-year history of Anglo-American jurisprudence that precludes any statute of limitations in litigation between a thief and his victim. Surely the Court cannot permit the Government to escape liability to the property owner by blessing the Army's abuse of the Hague Treaties proscribing confiscation of private property, by ignoring the law that no statute of limitations exists in litigation between the thief and his victim, and by permitting the Government to utilize (in 1951) provisions of the TWEA that lapsed in 1946 (Point III, *infra*), and then allowing the whole process to go forward with no notice to the property owner in Germany. *Ibid.* The Government has prevailed in this case as a result of the Federal Circuit ignoring patent procedural and substantive due process violations.

If the Government is permitted to retain the Nürnberg Photographs, then the Army, in substance, will have succeeded in confiscating the Nürnberg Photographs in derogation of the Hague Treaties, and in its violations of procedural and substantive due process. Such result makes a mockery of the law and of any Government criminal prosecution of individuals for war-time thefts of private artworks.

III.

THE FEDERAL CIRCUIT HAS DENIED DUE PROCESS PROTECTION OF THE FIFTH AMENDMENT TO THE GERMAN PLAINTIFFS BY ALLOWING THE GOVERNMENT TO RELY IN 1951 ON A LAW THAT EXPIRED BY PRESIDENTIAL PROCLAMATION IN 1946, AND BY HOLDING THAT THE TWO YEAR "STATUTE OF LIMITATIONS" PROVIDED IN THAT EXPIRED LAW SHIELDS THE GOVERNMENT FROM SUIT DESPITE THE FACT THAT NO NOTICE OF THE "VESTING ORDER" UNDER THE EXPIRED LAW WAS EVER GIVEN TO HOFFMANN JR. IN GERMANY

As pointed out (p. 18, *supra*), German tangible property must have been physically in the United States on or before December 31, 1946, to be subject to "vesting" under the TWEA. Vesting authority under the TWEA ceased on December 31, 1946, as to German tangible property brought to the United States after that date, because trade between Germany and the United States resumed January 1, 1947. Thereafter, German property moved freely into and out of the United States.

The vesting order in this case was entered in 1951 with respect to tangible German property the Army first seized in Germany (under the Hague Treaties) and then brought to the United States in late 1950. That 1951 vesting order was void *ab initio* and had no legal force and effect because the Government's acts were *ultra vires*: the property was brought to the United States after trade with Germany had resumed, *and* all power under the TWEA to vest any German property brought into the United States (including the Nürnberg

Photographs) had ceased December 31, 1946, after resumption of trade with Germany.[9] The legal result as to this facially-void vesting order is as though it had never been signed. The TWEA is not further involved, and the Government's duties and obligations of accounting for, returning, and compensating the owners of the Nürnberg Photographs are established by the Hague Treaties and/or the law of bailment.

The Federal Circuit ignored all of the foregoing[10] and allowed the Government to rely on a statute of limitations

9. "Agency actions beyond delegated authority are '*ultra vires*,' and courts must invalidate them." *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992).

10. The Federal Circuit concluded that the German Plaintiffs had a "full and fair opportunity to litigate this exact issue" (App. B, p. 18a) in the Southern District of Texas, a holding that stretches the facts of the case beyond recognition. The Government made a strategic decision not to rely on the vesting order and did not raise the vesting order until nine years into the case, after summary judgment had been entered against the Government. The vesting order was a fact that had to be proved before any argument under 28 U.S.C. § 2680(e) (FTCA exceptions) or 50 U.S.C. App. § 33 (TWEA) could be made. Having failed to raise the matter timely, doing so after a grant of summary judgment was too late, and the Southern District of Texas so held. *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992) (government bears the burden of proving exception to FTCA jurisdiction); *Donovan v. Mazzola*, 761 F.2d 1411, 1416 (9th Cir. 1985) (only a judgment showing a jurisdictional defect on its fact is subject to collateral attack). Clearly, the issue was never litigated in the Southern District of Texas — indeed, that court struck the Government's post-summary judgment pleadings raising the issue for the first time.

Just before oral argument in the Fifth Circuit, that court raised the vesting order issue *sua sponte*. Since the Fifth Circuit never considered the issue except in the context of FTCA jurisdiction, the constitutional issues raised herein were never litigated in the Southern District of Texas, much less "fully and fairly litigated," as characterized by the Federal Circuit.

under the TWEA that had ceased to be applicable to the Nürnberg Photographs at issue December 31, 1946. Such holding is obviously a due process violation.

Further the Federal Circuit's decision holds that Hoffmann Jr.'s claim against the Government arose in 1951, when the "vesting order" was entered, and concludes that the only remedy the German Plaintiffs had was a right to sue under the TWEA within two years of the date of the vesting order. (Appendix G, pp. 61a-62a.) That decision ignores the law that no statute of limitations exists when the thief is involved in litigation with the property owner, and that the constitutional infirmities inherent in this "vesting order" could never be cured by the expiration of the two-year statute of limitations for suit under the TWEA.

In 1951, the Government knew that Hoffmann Jr. was the owner of the Nürnberg Photographs, knew that he was not an "enemy" within the meaning of the TWEA, and knew how to contact him. Nevertheless, the Government gave no actual notice of the vesting order to Hoffmann Jr. (or to anyone else), instead publishing notice only in the *Federal Register*. By statute, notice in the *Federal Register* is sufficient only as to people within the United States. 44 U.S.C. § 1508. (Appendix G, pp. 61a-62a.) Such notice by publication is insufficient, however, even as to a person living within the United States, when more effective means of giving notice – such as actual notice to a known claimant with a known address – exists. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958):

> Past decisions of this Court emphasize that this summary power to seize property [under the TWEA] which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of

> the [Trading with the Enemy] Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure.

See also 44 U.S.C. § 1508 (a notice of hearing or of opportunity to be heard is sufficient in law when published in the *Federal Register* only for persons residing in the United States).

A useful analogy is shown in *Loudner v. United States*, 108 F.3d 896, 902 (8th Cir. 1997). There, Sioux Indians who resided in the United States sought to claim their share of a judgment fund created by Congress. They failed to make their claims within the six-year period granted by the statute. The Government had published notice of the fund in the *Federal Register*, but failed to use resources within its files that showed names and addresses of family members and ancestors of the Sioux tribe. Just as it has done here, the Government raised sovereign immunity as a bar to payment because of the statute of limitations. The court reasoned (108 F.3d at 901 n.2, 902):

> The way that courts have historically applied the statute of limitations to claims challenging so-called trust repudiations provides support for our approach. Where the trustee repudiates the trust by claiming to hold the trust corpus as the trustee's own, the cause of action does not accrue until the beneficiary "has knowledge of the repudiation." . . .
>
> We think that notice by publication is insufficient to begin the running of the statute of limitations against a beneficiary who is unaware of the trust's existence, unless there is no reasonable alternative. Because the steps that the government actually took were insufficient to put

> a reasonably diligent beneficiary on notice of the trusts' existence, the plaintiffs' claims are not time-barred. . . .

Likewise, pursuant to the German Plaintiffs' discovery of the existence of the vesting order in 1989, their 1989 TWEA action seeking return of the Nürnberg Photographs (and damages to the extent the Government cannot return the Photographs) is timely. Since Hoffmann Jr. never received actual notice of the vesting order in 1951 – despite the Government's possession of Hoffmann Jr.'s name and address and knowledge of his ownership and non-enemy status – even if the Government, as a thief, is permitted a statute of limitations defense, and the TWEA provision that expired in 1946 is somehow viewed as revitalized in 1951 without legislative intervention – the statute of limitations did not start to run against the German Plaintiffs until 1989, when the Government raised the "vesting order" issue in the Texas District Court for the first time, well after summary judgment had been granted for Plaintiffs.

IV.

IT WAS A VIOLATION OF FIFTH AMENDMENT DUE PROCESS TO DENY PRICE A RIGHT TO AN APPEAL TO THE FEDERAL CIRCUIT

The Federal Circuit declined to review Price's challenge to the order by the Texas District Court (Appendices E and F, pp. 52a-57a) dismissing him as a party plaintiff, holding that once a motion to transfer has been granted and the action transferred, the losing party must make a motion to retransfer the case in the transferee district court to preserve the issue for appeal. (Appendix B, pp. 12a-13a.) The cited rationale is inapposite here for three reasons: Price was out of the case as a result of the order of his dismissal. But no

judgment was entered against Price by the Texas District Court, and it was not until the D.C. District Court's judgment that Price's complaint was dismissed by a "final judgment." (Appendix D, pp. 50a-51a.) Price could not appeal from the Texas District Court's order that Price be dismissed because of the final judgment rule, and he is entitled by statute to appeal from the judgment against him entered by the D.C. District Court.

At issue is not the transfer order, but the dismissal of Price as a party plaintiff. Once the order dismissing Price was entered, the transfer from the Texas District Court to the D.C. District Court took place as a matter of course, because no basis for venue remained in the Texas District Court. The authorities cited by the Federal Circuit address motions to transfer, not motions to dismiss that have the effect of mandating a change of venue. The manner in which the transfer of the cases took place deprived Plaintiffs of any opportunity to appeal or seek mandamus in the Fifth Circuit, because absent the entry of a Rule 54(b) judgment by the Texas District Court *before* it transferred the record, the Fifth Circuit would have no jurisdiction on an appeal in 1998. *Hill v. Henderson*, 195 F.3d 671, 678 (D.C. Cir. 1999); *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1518 (10th Cir. 1991).

Furthermore, the Federal Circuit is a court of national jurisdiction, and Price's appeal could have come from a judgment of the Texas District Court, as well as a judgment from any other district court in the United States. Since all pre-transfer orders of the transferor court are reviewable after judgment by the transferee court's court of appeals (here, the Federal Circuit because this is a Little Tucker Act case), upon entry of judgment against Price by the D.C. District Court (Appendix D, pp. 50a-51a), upon Price's appeal to the Federal Circuit, that court must review the dismissal of Price as a plaintiff. *American Fidelity Fire Ins. Co. v. United*

States Dist. Court, 538 F.2d 1371, 1377 n.4 (9th Cir. 1976); *Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 870 (2d Cir. 1950).

Most importantly, it is a violation of Fifth Amendment due process for Price to be denied an appeal from the final judgment entered against him by the D.C. District Court.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari to the Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

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APPENDIX A — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING DATED, DECIDED AND FILED NOVEMBER 6, 2001

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

00-1131

ROBERT H. HOFFMANN, SUSANNE HUSTADT, KLAUS VON SCHIRACH, HEIDEMARIE KRUGER, HENRIETTE HOFFMANN VON SCHIRACH, and BILLY PRICE,

Plaintiffs-Appellants,

v.

UNITED STATES and John D. Ashcroft, ATTORNEY GENERAL OF THE UNITED STATES,

Defendants-Appellees.

DECIDED: November 6, 2001

ON PETITION FOR REHEARING

Before MICHEL, SCHALL, and DYK, *Circuit Judges*.

SCHALL, *Circuit Judge*.

The United States has filed a petition for rehearing. In its petition, the government points out that, in our decision of August 16, 2001, we did not rule on the government's argument that all of plaintiffs-appellants' claims are barred

by the "Convention on the Settlement of Matters Arising Out of the War and the Occupation," 6 U.S.T. 4411, T.I.A.S. No. 3425 (October 23, 1954) (the "Settlement Convention"). The government urges us to rule in its favor on the Settlement Convention issue. In the event that we deny rehearing on the Settlement Convention issue, the government asks us to clarify that our August 16 decision does not preclude it from presenting on remand the Settlement Convention issue, which the government says it presented to the district court but the court never addressed, as well as certain other arguments which the government says it presented to the district court but the court never addressed. Plaintiffs-Appellants respond to the government's petition as follows:

> Plaintiffs agree with the government that it is not precluded from any of its arguments with respect to the non-vested Photographic Archive and that the Court's Decision should not be read to imply such result. Similarly, all arguments previously made by Plaintiffs with respect to the non-vested Photographic Archive may be raised on remand.

The government's petition for rehearing is denied. We believe that, should it be necessary, the Settlement Convention issue should, in the first instance, be addressed by the district court. However, we clarify that our August 16 decision does not preclude the government from presenting on remand (i) the Settlement Convention issue and (ii) any additional issues that were previously raised by the government in the district court, but that were not addressed by the court, that are relevant to the matter of the "non-vested portion of the [photographic] archive."

At the same time, we point out that plaintiffs-appellants are not free to assert on remand "all arguments previously made" with respect to the "non-vested portion of the [photographic] archive." In view of our August 16 decision and our denial today of plaintiffs-appellants' petition for rehearing, plaintiffs-appellants are limited in terms of the arguments they may make on remand. The only claim that plaintiffs-appellants may assert on remand is their claim of an implied-in-fact contract of bailment with respect to the "non-vested portion of the [photographic] archive." In our August 16 decision, we concluded that, "based upon the material of record that has been presented to us, a genuine issue of material fact exists as to the existence of an implied-in-fact contract of bailment with respect to the non-vested portion of the [photographic] archive." We also concluded that further proceedings were required in the district court in order to address the government's statute of limitations defense. If the district court rules in the government's favor on its statute of limitations defense, or if it rules in the government's favor on any other dispositive defense that, consistent with this opinion, is properly before it, then the case will be over, subject, of course, to any appeal by plaintiffs-appellants. If, however, plaintiffs-appellants' action survives on remand, then, consistent with our August 16 decision, it will be necessary for the district court to consider the merits of plaintiffs-appellants' claim that there was an implied-in-fact contract of bailment with respect to the "non-vested portion of the [photographic] archive" and that the United States breached that contract.

As stated above, the government's petition for rehearing is denied.

No costs.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

Before MICHEL, Circuit Judge, SCHALL, Circuit Judge, and DYK, Circuit Judge.

A petition for rehearing having been filed by the APPELLANTS, and a response thereto having been invited by the court and filed by the APPELLEES,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on November 13, 2001.

FOR THE COURT,

s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: November 6, 2001

HOFFMANN V US, 00-1131
(DCT – 98-CV-857)

APPENDIX B — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND DECIDED AUGUST 16, 2001

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 00-1131

ROBERT H. HOFFMANN, SUSANNE HUSTADT, KLAUS VON SCHIRACH, HEIDEMARIE KRUGER, HENRIETTE HOFFMANN VON SCHIRACH, and BILLY PRICE,

Plaintiffs-Appellants,

v.

UNITED STATES and John D. Ashcroft, ATTORNEY GENERAL OF THE UNITED STATES,

Defendants-Appellees.

DECIDED: August 16, 2001

Before MICHEL, SCHALL, and DYK, *Circuit Judges*.

SCHALL, *Circuit Judge*.

DECISION

Robert Hoffmann, Susanne Hustadt, Klaus von Schirach, Heidemarie Kruger, and Henriette Hoffmann von Schirach (collectively, "Plaintiffs") appeal the decision of the United States District Court for the District of Columbia denying

their claim with respect to certain property recovered by the United States Army at the end of World War II. *Hoffmann v. United States*, 53 F.Supp.2d 483 (D.D.C. 1999). Billy F. Price appeals his dismissal as a plaintiff. The case grows out of Plaintiffs' efforts to obtain the return of, or compensation for, a photographic archive and paintings formerly belonging to Heinrich Hoffmann Sr. ("Hoffmann Sr."). Specifically, the property at issue before the district court consisted of (1) four watercolors painted by Adolph Hitler; (2) a photographic archive compiled by Hoffmann Sr. and his son, Heinrich Hoffmann Jr. ("Hoffmann Jr."), part of which the Attorney General of the United States vested in 1951 pursuant to the Trading with the Enemy Act, 50 U.S.C. App. § 1 *et seq* ("TWEA"), and part of which remains non-vested but, at least allegedly, in the possession of the United States; and (3) the "Time-Life archive," a photographic archive given to the United States in the early 1980s by Time-Life, Inc.

Hoffmann Sr. and Hoffmann Jr. are both deceased. Plaintiffs are the heirs of Hoffmann Sr.'s children, Hoffmann, Jr. (Robert Hoffmann, Heidemarie Kruger, and Susanne Hustadt) and Henriette Hoffmann von Schirach (Klaus von Schirach, Executor of her estate). Price, an art investor and author of a Hitler biography, became involved in the case in 1982 when he learned that Hoffmann Sr. had been the owner of the watercolors. Price paid a nominal sum to the Hoffmann heirs in exchange for their rights in the watercolors and archives, promising to seek return of the property and to give Plaintiffs a portion of whatever compensation he might receive from the United States government.

Appendix B

The instant case was consolidated in the United States District Court for the Southern District of Texas on October 2, 1997, from two actions brought by Price and Plaintiffs in that court, in 1989 and 1997. The Texas district court held that the conveyance of an interest in the property to Price was an improper assignment of a claim of interest against the United States in violation of the Anti-Assignment Act, 31 U.S.C. § 3727 (1994). Accordingly, on March 24, 1998, Price was dismissed as a plaintiff, and the case was transferred to the District of Columbia.

The District of Columbia district court granted summary judgment in favor of the government after rejecting Plaintiffs' claims based on the theories of implied-in-fact contract (bailment), Fifth Amendment takings, and tortious conversion. On appeal, Plaintiffs challenge the order transferring the case to the District of Columbia (the "transfer order") and the rulings of the district court on their claims. Price challenges the transfer order and his dismissal from the case. We decline to consider the issue of the transfer order, and with it Price's dismissal from the case, because the issue of the transfer order was not raised in the district court. As far as the merits of the case are concerned, we *affirm* the district court's grant of summary judgment insofar as it relates to the watercolors. We also *affirm* the district court's grant of summary judgment with respect to the vested portion of the archive. Finally, we *vacate* the grant of summary judgment insofar as it relates to the non-vested portion of the archive and *remand*. We do so in order that the district court may determine in the first instance whether Plaintiffs' claim relating to the non-vested portion of the archive is barred by the applicable statute of limitations. In the event that the court determines that the

claim relating to the non-vested portion of the archive is not barred by the statute of limitations, it will be necessary for it to consider factual issues relating to Plaintiffs' contention that an implied-in-fact contract arose relating to that property.[1]

DISCUSSION

I.

In May of 1945, the United States Army seized the portion of the Hoffmann archive that was stored in Winhoring, Germany and sent parts of what was seized to Nuremberg for use by the War Crimes Commission. On May 31, 1951, the Assistant Attorney General and Director of Alien Property executed an order vesting all right, title, interest and claim in the Nuremberg portion of the archive in the Attorney General of the United States. Plaintiffs contend that the United States Army possesses the rest of the Winhoring archive, as well as photographs seized at other locations in Germany. These are the photographs that comprise the non-vested portion of the Hoffmann archive. In addition to the photographs, the United States Army also seized the four Hitler watercolors. The Army transferred the watercolors to a central collecting facility in Munich, and subsequently shipped them to the United States.

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1. Plaintiffs do not challenge the rulings of the district court with respect to the Time-Life archive.

Appendix B

II.

Together with Price, Plaintiffs brought suit in the United States District Court for the Southern District of Texas in 1983 for the return of the watercolors and the photographs that the United States Army had seized. Alternatively, Price and Plaintiffs sought money damages for the tortious conversion of the property. Eventually, in 1989, the district court entered partial summary judgment on the issue of liability in Price's and Plaintiffs' favor, on the ground that the United States had wrongfully converted the property by refusing to return it. *Price v. United States*, ("*Price I*"), 707 F. Supp. 1465 (S.D. Tex. 1989). Subsequently, the court awarded Price and Plaintiffs nearly $8 million in damages. On appeal, the United States Court of Appeals for the Fifth Circuit reversed the judgment of the district court and remanded the case for entry of judgment of dismissal with prejudice as to the claims for the watercolors and photographs, other than the Time-Life archive. *Price v. United States*, ("*Price II*"), 69 F.3d 46, 54 (5th Cir. 1995). Regarding the watercolors, the court ruled that evidence in the record indicated that a tortious conversion of the paintings occurred in Germany, when the paintings were seized and shipped to the United States, not upon the United States' refusal to return the property to the Hoffmann family. *Id.* at 52. Regarding the photographs, the court ruled that the vesting order placed Plaintiffs' claim outside the United States' waiver of sovereign immunity. *Id.* Additionally, the court held, any challenge to the vesting order itself was barred by the statute of limitations pursuant to 50 U.S.C. App § 33 (1988). *Id.* at 53. The Fifth Circuit dismissed the claim relating to the Time-Life archive without prejudice, because Price had failed to

exhaust his administrative remedies under the Federal Torts Claim Act ("FTCA"), 28 U.S.C. § 2401(b) (1988). *Id.* On petition for rehearing, the Fifth Circuit concluded that the vesting order did not cover all of the photographs allegedly seized by the United States Army. *Price v. United States*, ("*Price III*"), 81 F.3d 520 (5th Cir. 1996). Therefore, the court dismissed the portion of the claim relating to the photographs not subject to the vesting order. The court stated that the dismissal was without prejudice to "a separate lawsuit pending in the district court." *Id.* That "separate lawsuit" was the 1989 action in the Southern District of Texas, which subsequently was consolidated with the 1997 action in the same court.

III.

As noted above, what was before the district court in the District of Columbia was a consolidated complaint that originally was filed in the Southern District of Texas. With respect to the bailment claims, the District of Columbia court concluded that Plaintiffs had failed to raise a genuine issue of material fact as to whether an implied-in-fact contract of bailment was created with respect to any of the property, because they could not show that the United States had taken the watercolors or any of the photographs, whether or not covered by the vesting order, with the intention of returning them. *Id.* at 489-90. Similarly, with respect to the Fifth Amendment claims, the court determined that Plaintiffs had failed to establish the necessary voluntary or contractual relationship with the United States to avail themselves of the Fifth Amendment as non-residents. *Id.* at 491. As far as Plaintiffs' FTCA claims were concerned, the district court

ruled that res judicata barred review of the Fifth Circuit's dismissal of the claim for the watercolors. *Id.* at 493. With respect to the non-vested portion of the archive, the court concluded that the conversion claims accrued on May 20, 1949, when Hoffmann was informed of the fact that the United States forwarded his entire archive to Washington. *Id.* Therefore, the court held, Plaintiffs' claims, to the extent that they were grounded in tort, were barred by the statute of limitations. *Id.*

The district court granted summary judgment in favor of the government on all claims except the Time-Life archive. *Id.* at 495. As noted above, subsequent to the decision, Plaintiffs relinquished their claims against the government with respect to the Time-Life archive.

IV.

We have jurisdiction to review the decision of a district court that is based in whole or in part on 28 U.S.C. § 1346(a)(2) (1994), the Little Tucker Act. 28 U.S.C. § 1295(a)(2) (1994). The Little Tucker Act grants concurrent jurisdiction in the Court of Federal Claims and the United States district courts for any "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1346(a)(2) (1994). In their consolidated complaint, Plaintiffs claim $9000 in contract damages for the four watercolors, as well as $9000 for the non-vested portion of the archive.

The instant appeal also includes claims based not only on the Little Tucker Act, but also on the FTCA. While we ordinarily do not have appellate jurisdiction over FTCA claims, see 28 U.S.C. § 1295(a)(2), "a mixed case, presenting both a nontax Little Tucker Act claim and an FTCA claim, may be appealed only to the Federal Circuit." *United States v. Hohri*, 482 U.S. 64, 75-76 (1987); *see also Gollehon Farming v. United States*, 207 F.3d 1373, 1378 (Fed. Cir. 2000). Thus, because the district court had jurisdiction over this case based in part on the Little Tucker Act, we retain exclusive appellate jurisdiction over all the claims present in the case.

V.

As noted above, the United States District Court for the Southern District of Texas ordered the case based upon the consolidated complaint transferred to the District of Columbia after it dismissed Price from the case. In arguing that the case should not have been transferred, Plaintiffs and Price contend that the court erred in the underlying ruling, the dismissal of Price from the case. We decline to consider Plaintiffs' challenge to the order that transferred the case from the Texas district court to the District of Columbia. Once a motion to transfer has been granted and the action has been transferred, the losing party must make a motion to retransfer the case in the transferee district court in order to preserve the issue for appeal. 17 James Wm. Moore et al., Moore's Federal Practice, ¶111.64[2][b] (3d ed. 1999). If no motion is made, neither the transferee circuit nor the transferor circuit has jurisdiction to review the transfer order. *Id*; *Hill v. Henderson*, 195 F.3d 671, 677 (D.C. Cir. 1999) (noting that

the term "jurisdiction" as applied to a court's ability to review a transfer order, refers to venue rather than subject matter jurisdiction). In this case, it is undisputed that Plaintiffs made no motion to retransfer the case back to the Texas district court. Since parties may normally consent to be sued in a court that would otherwise be an improper venue, Plaintiffs' failure to object waives the issue. *See* Fed. R. Civ. P. 12(h)(1); *Hill*, 195 F.3d at 677 n.2 (citing *Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996)). Accordingly, we will not review the transfer order or the underlying ruling dismissing Price from the case based upon a violation of the Anti-Assignment Act.

VI.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Ysasi v. Rivkind*, 856 F.2d 1520, 1524 (Fed. Cir. 1988). We review a grant of summary judgment without deference. *Ysasi*, 856 F.2d at 1524. In addition, we must, as the district court was required to do, draw all reasonable factual inferences in favor of the nonmovant. *Anderson*, 477 U.S. at 255.

Plaintiffs challenge all aspects of the district court's ruling, including the conclusion that Plaintiffs, as non-resident aliens, cannot assert a Fifth Amendment claim for any of the disputed properties. Plaintiffs argue that the Fifth Amendment does not distinguish between aliens and citizens,

and note that the Supreme Court has held that Fifth Amendment protection can extend to a non-enemy alien. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931). However, constitutional protections extend to aliens only "when they have come within the territory of the United States and developed substantial connections with this country." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990). Because Plaintiffs have failed to establish "substantial connections" to the United States, we affirm the district court's decision with respect to Plaintiffs' Fifth Amendment claims. We therefore turn to Plaintiffs' contract and tort claims with respect to each of the remaining items of property at issue.

A. *Watercolors*

Plaintiffs allege that an implied-in-fact contract of bailment was created when the United States Army seized the four paintings. "Tucker Act jurisdiction extends only to contracts either express or implied-in-fact, and not to claims on contracts implied in law." *Hercules Inc. v. United States*, 516 U.S. 417, 423 (1996); *Trauma Serv. Group v. United States*, 104 F.3d 1321, 1324-25 (Fed. Cir. 1997). Plaintiffs allege that an implied-in-fact bailment contract was created when the United States Army seized the four paintings from Hoffmann's home and removed them to the Munich Central Collection Point in 1946. Whether a contract exists is a mixed question of law and fact. *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998). To prove that an implied-in-fact bailment contract exists, a claimant must show a "mutuality of intent to contract, offer and acceptance, and that the officer whose conduct is relied upon had actual

authority to bind the government in contract." *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed. Cir. 1984). For the United States to be bound by an implied-in-fact contract of bailment, there must be "a promise, representation or statement by any authorized government official" that the property would be returned. *Ysasi*, 856 F.2d at 1525. Plaintiffs contend that the Army's conduct with respect to the watercolors demonstrates the existence of a bailment. Plaintiffs presented testimony that the Munich Central Collection Point, where the paintings were held before being shipped to the United States, was established for the purpose of identifying seized objects for return to their owners. *Id.* at 490. The Army's transfer of the paintings to the collection center, Plaintiffs argue, demonstrates that the United States intended to return the paintings to their original owners.

While the decision of the Fifth circuit is not collateral estoppel on this issue, we agree with the Fifth Circuit that the evidence "will not support a conclusion that the *watercolors* were held in bailment." *Price II*, 69 F.3d at 52 (emphasis in the original). The district court correctly held that evidence as to the general purpose of the Munich Central Collection Point is insufficient to support the specific inference that the Army brought the paintings to the collection center with the intention of returning them to the Hoffmann family. Plaintiffs fail to allege that an official with authority actually bound the United States to return the paintings. Significantly, the Army returned other artwork belonging to Hoffmann Sr. about the same time the watercolors were confiscated, but continued to retain possession of the watercolors painted by Hitler. *Hoffmann*, 53 F.Supp.2d at

492 (citing *Price II*, 69 F.3d at 51). The divergent conduct indicates, if anything, an intent not to return the watercolors, as the Army could have returned the paintings as it did the rest of Hoffmann Sr.'s art collection. We therefore affirm the district court's grant of summary judgment as it relates to the watercolors.

B. *Vested Portion of the Archive*

Plaintiffs challenge the district court's ruling that they failed to present sufficient evidence to show that a genuine issue of material fact existed as to whether a bailment contract was created when the United States took a portion of the Hoffmann family photographs for use at Nuremberg. A bailment was created in May of 1945, Plaintiffs argue, from the conversations between Hoffmann Jr. and certain Army personnel at Nuremberg. In the district court, the government argued that no implied-in-fact contract was created with respect to the vested archive and that, in any event, any claim based upon such a contract was barred by the applicable statute of limitations. The district court did not address the government's statute of limitations argument. Instead, it granted summary judgment based upon the merits. Even assuming that such a contract was created, we conclude that any claim for it is time-barred.

The Little Tucker Act sets up a jurisdictional scheme for certain claims against the United States. *Broughton Lumber Co. v. Yeutter*, 939 F.2d 1547, 1556 (Fed. Cir. 1991). The six-year statute of limitations of the Little Tucker Act, 28 U.S.C. § 2401(a) (1994), is a limitation on the district court's jurisdiction. *Bray v. United States*, 785 F.2d 989, 992 (Fed.

Cir. 1986). Because jurisdictional determinations are questions of law, we review de novo a court's decision to dismiss a claim as barred by a statute of limitations. *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (discussing 28 U.S.C. § 2501, the analogous statute of limitations for suits against the government brought in the Court of Federal Claims, *see Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 n.3 (Fed. Cir. 1988)).

A claim first accrues for purposes of 28 U.S.C. § 2401(a), (and its analogous 28 U.S.C. § 2501), "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Alder Terrace*, 161 F.3d at 1377 (quoting *Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988); *see also Hopland*, 855 F.2d at 1577 (stating that a claim accrues only when "all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence"). Generally, in the case of a breach of a contract, a cause of action accrues when the breach occurs. *Alder Terrace*, 161 F.3d at 1377. A breach of contact is a failure to perform a contractual duty when it is due. *Trauma Serv. Group*, 104 F.3d at 1325. In the case of a bailment contract, the breach, or failure to perform, occurs when the bailee refuses to return the property at the request of the owner. *See Ysasi*, 856 F.2d at 1525.

Any bailment contract that might have been created with respect to the vested portion of the archive plainly was breached in 1951 by the vesting order. Plaintiffs attempt to avoid this problem, however, by challenging the validity of the vesting order under the TWEA. The TWEA provides that

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"[a]ny person not an enemy or ally of an enemy claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him . . . may file with the said custodian a notice of his claim" for the President to determine entitlement. 50 U.S.C. App. § 9(a) (1994). However, under the TWEA, any claim that is instituted "after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought" is barred. 50 U.S.C. App. § 33 (1994). The district court held that Plaintiffs TWEA claims were barred by this statute of limitations, because the vesting order was dated May 31, 1951.

The Fifth Circuit decided that Plaintiffs' challenge to the validity of the vesting order under the TWEA was barred by the statute of limitations because the vesting order was dated May 31, 1951. Because Plaintiffs had a full and fair opportunity to litigate this exact issue in the first action in Texas, and because the Fifth Circuit's ruling on this issue was necessary to the judgment in that action, Plaintiffs are precluded from relitigating their challenge to the vesting order in this action. *See Innovad Inc. v. Microsoft Corp.*, 2001 WL 877583, *6 (Fed. Cir. 2001) (citing *In re Freeman*, 30 F.3d 1459, 1465, 31 USPQ2d 1444, 1448 (Fed. Cir. 1994)). We therefore affirm the district court's grant of summary judgment with respect to the vested portion of the archive. We do so on the ground that the claim is time-barred.

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C. *Non-Vested Portion of the Archive*

Finally, we turn to Plaintiffs' claims that an implied-in-fact contract of bailment was created with respect to the non-vested portion of the archive. The district court did not address the government's statute of limitations argument with respect to the non-vested portion of the archive and granted summary judgment instead based upon the merits. As far as the merits are concerned, Plaintiffs did not present evidence specifically regarding the bailment of the non-vested portion of the archive, stating merely that the evidence presented regarding the vested portion of the archive applied to the entire archive. Plaintiffs contended that an implied-in-fact contract of bailment was created in May of 1945 when the United States Army seized the entire Hoffmann photographic collection from Germany.

Evidence in the record indicates that there is a possibility that both members of the United States Army as well as Hoffmann Jr. were under the impression that the non-vested photographs were on loan to the United States. Specifically, Plaintiffs' presented a 1948 Opinion of Chief of the Historical Division in Washington stating that "technically, [Hoffmann's] files are probably his personal property." A March 14, 1949 memorandum of Major Raymond Hill to a Colonel Potter noted that Major Hill "had received authority from Berlin to transfer the entire Hoffmann photographic collection to the Historical Division. Captain Paul stated that he had previously been under the assumption that the collection would revert to the ownership of Hoffmann upon completion of its use." Additionally, a 1949 letter from a Colonel Harris to Colonel Potter stated that it "seems likely" that the archive will be returned to its original owner.

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In February of 1950, the Army requested that Hoffmann Jr. provide certain information "[i]n order to determine the exact legal status of the photographic file of which you are the alleged former owner." The Army expressed its concern in a January 24, 1950, letter to the Historical Division that it did not "acquire title" to the missing archive, raising the possibility that it "could be required to return it and fix compensation for its use when peace is made." Finally, in a 1951 memorandum, the Chief of the Historical Division in Europe stated "[i]f it can be proven that part of the Hoffmann photographic file does not fall within the classification of property the existence of which is prejudicial to the United States Government and any of its agencies, then our retention of such property, it is believed, cannot be justified legally." Evidence suggesting that the legal status of the non-vested portion of the archive was unresolved raises the possibility of "a promise, representation or statement by any . . . authorized government official," *Ysasi*, 856 F.2d at 1525, that the property was being held in bailment until its return.

In Hoffmann Jr.'s June 17, 1949 letter he wrote, "an American jurist also assured me, after a private inquiry, that there was a U.S. regulation in force that could not deprive me of my archive. . . . I held the opinion until 20 May 49 that my property would be returned to me." In a May 15, 1950 letter Hoffmann Jr. wrote that "I was assured by U.S. officials at Nuremberg that my photo archives were regarded by the U.S. Army as a loan for the duration of the trials." In the highly unusual circumstances of this case, evidence of Hoffmann's impressions from the United States officials demonstrates the possibility that an "authorized government official," *Ysasi*, 856 F.2d at 1525, represented that the United

States Army would return the photographs to Hoffmann Jr. We therefore conclude that, based upon the material of record that has been presented to us, a genuine issue of material fact exists as to the existence of an implied-in-fact contract of bailment with respect to the non-vested portion of the archive.

At the same time, however, evidence in the record indicates that, at some time prior to March 14, 1949, authority was granted for the Army to transfer the "entire Hoffmann photographic collection," both vested and non-vested portions, to the United States. Hoffmann Jr.'s June 17, 1949 letter to the Army's Historical Division indicated that he was aware of the two parts of his archive — the portion used in Nuremberg and the rest — and protested the Army's possession of both portions: "On 20 May 49 I was informed by Major Murphy, Historical Division, Frankfurt/Main, that my entire photo archive had been forwarded to Washington and I had no right to claim its return." After a series of letters exchanged between Hoffmann Jr. and the United States, the Army shipped the entire archive to the United States without returning any portion to the Hoffmann family. On January 29, 1951, Hoffmann Jr. again protested the Army's confiscation of the photographs. In March of 1956, an attorney hired by Hoffmann Jr. asserted a claim for the return of the photographs. The attorney was informed that the return of the property would have to occur through "diplomatic channels," and "[i]f Mr. Hoffmann desires to pursue this matter further, he may refer his claim to the German Foreign Office." This response to the letter from Hoffmann Jr.'s counsel indicates the denial of the existence of any contract of bailment with respect to the photographs, including the

non-vested portion of the archive, which denial would be a breach of contract. Since the breach occurred more than six years before suit was filed, any claim based upon it relating to the non-vested portion of the archive would be time-barred.

While the foregoing suggests merit to the government's statute of limitations argument, we believe that, in the first instance, the issue should be addressed by the district court, particularly in view of the voluminous record in this case. The question to be addressed is, assuming that an implied-in-fact contract of bailment existed, at what point did the government fail to perform on the contract.

For the foregoing reasons, we *affirm* the district court's grant of summary judgment insofar as it relates to the watercolors and the vested portion of the archive. We *vacate* the grant of summary judgment insofar as it relates to the non-vested portion of the archive and *remand* the case for further proceedings consistent with this opinion.

Each party shall bear its own costs.

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED JUNE 28, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 98-0857 (HHK)

ROBERT H. HOFFMANN, ESTATE OF HENRIETTE HOFFMAN VON SCHIRACH, HEIDEMARIE KRUGER and SUSANNE HUSTADT,

Plaintiffs,

v.

UNITED STATES OF AMERICA and JANET RENO, as ex officio ALIEN PROPERTY CUSTODIAN,

Defendants.

MEMORANDUM OPINION

Plaintiffs, German citizens, have brought this action to recover photographic archives and paintings formerly belonging to Heinrich Hoffmann Sr. Their claims are for contract damages and tort damages, and for violations of the Fifth Amendment and the Trading With the Enemy Act.[1]

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1. The Consolidated Complaint also purports to state a claim for relief under Article 53, Annex to the Hague Convention IV. Compl. (Cont'd)

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Before the court are defendants' motion to dismiss or for summary judgment and plaintiffs' motion for summary judgment. Upon consideration of the motions, the responses thereto, and the entire record of this case, the court concludes that defendants' motion for summary judgment should be granted with respect to all claims except for those with respect to the Time-Life archives, as described below.

I. Factual Background

This lawsuit is "simply a claim for damages resulting from the tortious conversion of chattels" by the United States. *Price v. United States*, 69 F.3d 46, 48 (5th Cir. 1995); *cert. denied*, 519 U.S. 927 (1996). The chattels consist of photographic archives compiled by Heinrich Hoffmann ("Hoffmann Sr.") and his son, Heinrich Hoffmann Jr. ("Hoffmann Jr.") and four watercolor paintings by Adolf Hitler. Plaintiffs are the Estate of Henriette von Schirach, Hoffmann Sr.s daughter, Robert H. Hoffmann, Heidemarie Kruger, and Susanne Hustadt.

According to a biographical record submitted by plaintiffs, during World War I, Hoffmann served as a photographer in the Bavarian army. He first met Adolf Hitler in 1919, "the beginning of an intimate personal relationship":

(Cont'd)

¶ 5. Within the counts of the complaint, however, the alleged violation of Article 53 serves only as a predicate to the Federal Tort Claims Act claims alleged in Count 17, and, by reference, Count 18. Compl. ¶ 120, 134. The complaint does not state an independent Hague Convention claim.

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> Hitler would often visit the Hoffmanns' home in Munich for relaxation. It was through the photographer that the future leader of the Third Reich first met Eva Braun who worked in his shop, and Hoffmann also frequently drove him to the Wagner home in Bayreuth to see Frau Winifred Wagner. In 1920 Hoffmann joined the [National Socialist Workers' Party] and soon belonged to the inner circle of Hitler's intimate companions. The only man allowed to photograph the Führer, he accompanied him everywhere on his road to power and later, during World War II, travelled with him to all the various fronts. Hoffmann's two-and-a-half million photographs provide a unique record of twenty-five years of German history and helped to make him an enormously wealthy man, as well as enriching Hitler himself and enhancing his popularity. . . . It was Hoffmann's idea that Hitler should receive a royalty for every photograph of himself which appeared on a postage stamp, which led to the accumulation of enormous sums of money to the Führer's account. Hoffmann was tried as a Nazi profiteer in 1947, sentenced to ten years' imprisonment (later reduced to three, then raised to five years in 1950) and nearly all of his personal fortune was confiscated. He died in Munich on 16 December 1957.

Robert Wistrich, Who's Who in Nazi Germany 155, Pl. Ex. 405, Attach. 12; see also 1 Christian Zentner & Friedemann Bedürftig, eds., The Encyclopedia of the Third Reich 437 (Amy Hackett trans., 1991). But see Pl.'s Br. Supp. Summ. J. at ¶ 19 (stating that Hoffmann's sentence was for four years).

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In addition to his work for Hitler, from 1905 to 1945 Hoffmann Sr. owned and operated his family's photography business in Germany, which included a portrait studio, a fine arts press, and a well-known press photography agency. Beginning with a collection of photographs dating from the 1860s through the early 1900s that he had obtained from his grandfather, father, uncle, Hoffmann Sr. built a vast archive of photographic images.

Hoffmann Jr. joined his father's business in the mid-1930s, and managed the press agency and a fine arts magazine from 1940 to 1945. In 1937 Hoffmann Sr. transferred all of his then-existing photographic archives to Hoffmann Jr. After that date, both father and son continued to accumulate photographs in their respective archives.

According to plaintiffs, the U.S. Army in May 1945 seized the portion of the Hoffmann archives that had been stored in the town of Winhöring. In late 1945, the U.S. sent part of the archives seized in Winhöring to Nürnberg for use by the War Crimes Commission from 1945 to 1949. This "Nürnberg archive" was subsequently transferred to the Army's Historical Division in Frankfurt on April 27, 1949, and thereafter shipped to the Army's German Military Documents Section in Alexandria, Virginia, on October 26, 1949. On May 31, 1951, the Assistant Attorney General and Director of the Office of Alien Property executed an order vesting all rights, title, interest and claim in the Nürnberg archive in the Attorney General of the United States. Ex. P-133.

In addition to the photographic archive covered by the vesting order, plaintiffs allege that the Army also continues

to possess the remainder of the archives that were seized in Winhöring, as well as "missing" portions of the Hoffmann photographic archives that had been seized by the Army in Freising and Bavaria. *See* Pl.'s Statement of Facts ¶ 39-40.

Plaintiffs also allege that the Army possesses four watercolors painted by Hitler that Hoffmann Sr. acquired during the 1930s and 1940s. After the war, United States troops discovered the watercolors in the village of Dietramszell and transferred them to a central collecting facility in Munich. The military authorities there in 1949 ordered the paintings to be transferred to Wiesbaden, from where they were shipped to the United States. Pl.'s Statement of Facts ¶ 68-71, 73.

Between 1949 and 1951, Hoffmann Jr. wrote various officers of the Historical Division protesting the Army's transfer of his "entire photo archive" to the United States. *See* Ex. P-85; *see also* P-93, P-97, P-99, P-105, P-109, P-125. Unbeknownst to Hoffmann Jr., however, a further portion of the Hoffmann photographic archives had been taken from Hoffmann's Berlin studio in May 1945 by a LIFE magazine photographer. *See* Ex. P-163. These archives (the "Time-Life archives") came into the possession of the United States in the early 1980s, when Time-Life Inc. donated it to the U.S. Military History Institute in Carlisle, Pennsylvania.

Plaintiffs in the present case, together with Texas businessman Billy Price, initially brought suit for the return of the watercolors and photographic archives in the Southern District of Texas in 1983. The district court entered a partial summary judgment on the issue of liability in Price's favor.

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Price v. United States, 707 F. Supp. 1465 (S.D. Tex. 1989). On appeal, the Fifth Circuit reversed and remanded for entry of judgment of dismissal with prejudice as to the claims for the watercolors and the photographic archives other than the Time-Life archives. 69 F.3d 46, 54 (5th Cir. 1995). Finding that Price had failed to exhaust administrative remedies with respect to the Time-Life archives, the appeals court dismissed the claims for those archives without prejudice. *Id.* On petition for rehearing, the Fifth Circuit noted that the vesting order did not cover all of the Hoffmanns' photographic archives alleged to have been seized by the Army in Germany. 81 F.3d 521 (5th Cir. 1996). Accordingly, the Fifth Circuit held that with respect to the archives not covered by the vesting order, its dismissal was also without prejudice to the present lawsuit.

The instant case was consolidated in the Southern District of Texas on October 2, 1997, from two actions brought by the same plaintiffs, including Price, in 1989 and 1997. That court held that a conveyance to Price by plaintiffs von Schirach and Hoffmann Jr. of their interests in the photographic archives was an assignment of a claim against the United States in violation of the Anti-Assignment Act. Accordingly, on March 24, 1998, Price was dismissed as a plaintiff, and the case was transferred to this court.

The claims remaining in the consolidated complaint are as follows. Plaintiff Estate of von Schirach seeks damages for breach of contract or violation of the takings clause of the Fifth Amendment (count 3), and specific performance (count 4), with respect to the watercolors. All plaintiffs seek damages for the General Services Administration's refusal

to turn over the photographic archives not covered by the vesting order to von Schirach and Hoffmann Jr. under tort law (count 9) and the Federal Tort Claims Act (count 10). All plaintiffs also seek damages for breach of contract or violation of the takings clause of the Fifth Amendment (count 11), and specific performance (count 12), with respect to the photographic archives not covered by the vesting order. For the Army's failure to return the Time/Life archives, plaintiffs seek damages under tort law (count 13) and the takings clause of the Fifth Amendment (count 14), and specific performance (count 15). With respect to the archives covered by the vesting order, plaintiffs seek review of the validity of the vesting order under the Trading With the Enemy Act and the takings clause of the Fifth Amendment (count 16), and damages for conspiracy and fraudulent concealment under the Federal Tort Claims Act (count 18).

II. Standards of Review

A. Dismissal

A Rule 12(b)(6) motion "tests the legal sufficiency of the complaint." *ACLU Foundation of Southern Calif. v. Barr*, 952 F.2d 457, 472 (D.C. Cir. 1991). When reviewing such motions, the court must take the allegations in non-movant's pleading as true and must construe them in a light most favorable to the non-moving party. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Sinclair v. Kleindienst*, 711 F.2d 291, 293 (D.C. Cir. 1983). Reviewed in this light, a motion to dismiss may not be granted "unless it appears that a plaintiff can prove no facts in support of the claim which would entitle the plaintiff to relief." *Conley*, 355 U.S. at 45-46.

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B. Summary Judgment

A motion for summary judgment should be granted if and only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party's "initial responsibility" consists of "informing the [trial] court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986) (internal quotation marks omitted).

If the moving party meets its burden, the burden then shifts to the non-moving party to establish that a genuine issue as to any material fact actually does exist. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1355 (1986). The non-moving party is "required to provide evidence that would permit a reasonable jury to find" in its favor. *Laningham v. Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987). Such evidence must consist of more than mere unsupported allegations or denials and must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 322 n.3, 106 U.S. at 2552 n.3. If the evidence is "merely colorable" or "not significantly probative," summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511 (1986).

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III. Discussion

A. The Contract/Bailment Claims

The United States is "immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Testan*, 424 U.S. 392, 399 (1976) (quotation omitted). While the Tucker Act, 28 U.S.C. § 1491(a), confers jurisdiction to hear and determine claims against the United States founded upon any "express or implied" contract with the United States, "this jurisdiction extends only to contracts either express or implied in fact, and not to claims on contracts implied in law." *Hercules Inc. v. United States*, 516 U.S. 417, 423 (1996). Accordingly, plaintiffs have alleged the existence of contracts implied in fact binding the United States to return each of the properties in issue in this case.

1. The Archives Covered by the Vesting Order

Plaintiffs contend that an "implied-in-fact bailment" was created between the Army and the Hoffmanns whereby there was a "fiduciary obligation that, some day the Army would have to return the Nürnburg photographic archives to the Hoffmanns and pay compensation." Pl.'s Statement of Facts ¶ 32 (citing Ex. P-129 and P-91, ¶ 5). As principal support for this theory, plaintiffs offer the following text from a March 28, 1951, decision of the Judge Advocate General:

> Assuming, as is stated in the submitted file, that the Hoffmann photographic file was seized in

> furtherance of the objectives set out in subparagraph 3-III of the Potsdam Agreement, it is the opinion of this office that the mentioned photographic file is being legally held by the Department of the Army.

Ex. P-129. Plaintiffs also cite a January 24, 1950, memorandum from the Special Staff of the Historical Division in Washington to the division's European office noting "the possibility, if we use the Hoffmann file, that under the provisions of Article 53, Annex to the Hague Convention IV, the Army could be required to return it and fix compensation for its use when peace is made." Ex. P-91, ¶ 5.

To demonstrate an implied-in-fact contract binding the United States within the meaning of the Tucker Act, plaintiffs must show "mutuality of intent to contract, offer and acceptance, and that the officer whose conduct is relied upon had actual authority to bind the government in contract." *Ysasi v. Rivkind*, 856 F.2d 1520, 1525 (Fed. Cir. 1988) (quoting *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985)). Thus, an implied-in-fact contract "must be stated in the form of an undertaking, not as a mere prediction or statement of opinion or intention." *Cutler-Hammer v. United States*, 441 F.2d 1179, 1182 (Ct. Cl. 1971). For the government to be bound by an implied-in-fact bailment, there must be "a promise, representation or statement by any authorized government official" that the property would be returned. *See id.* (citation omitted).

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The record, however, is devoid of any promise, representation or statement by an authorized official to the Hoffmanns having either the purpose or effect of communicating an offer to return the archives. The Judge Advocate General's decision, far from suggesting that the archives would be returned to the Hoffmanns, concludes that the archives were "being legally held" by the Army. The Historical Division's internal memorandum notes a "possibility" that the Army would be required to return the archives, but nowhere contains a promise, representation or statement that it would actually do so.

Each of the other documents offered in support of plaintiffs' bailment theory refers to the return of the archives as a possibility or contingency, not as an undertaking. *See* Letter from Harry J. Malony, Chief of the Historical Division in Washington, to the Historical Division in Europe, of 12/30/48, Ex. P-74 (opining that "technically, his files are probably his personal property"); Memorandum from Maj. Raymond D. Hill to Col. Potter of 3/14/49, Ex. P-79 (noting that "Capt. Paul stated that he had previously been under the assumption that the collection would revert to the ownership of Hoffmann upon completion of its use"); Letter from Lt. Col. E.M. Harris to the Historical Division in Europe, Ex. P-87 (stating that "[i]t seems likely" that the file will have to be returned to its original owner in Germany); Memorandum of Judge Advocate General of 11/18/49, Ex. P-90 (finding that the Nürnberg archive was "propaganda which is aimed at keeping alive, reviving or promoting the military or Nazi spirit and institutions, or glorifying war," within the meaning of Control Council Law No. 8, and therefore "may not at present be returned to the owner");

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Memorandum from W.S. Nye, Chief of Historical Division in Europe, to Col. Hanley, Judge Advocate Division of 2/5/51, Ex. P-127 (stating that "[i]f it can be proven that a part of the Hoffmann Photographic File does not fall within the classification of property the existence of which is prejudicial to the United States Government and any of its agencies," retention of the Hoffmann Photographic File by the United States cannot be justified legally). None of these documents is addressed to the Hoffmanns or appears in any way to have been intended as a communication to the Hoffmanns regarding the archives. Moreover, to the extent that these statements simply express tentative legal conclusions as to the ownership of the archives, "this would at most create a bailment by operation of law, not an implied-in-fact bailment contract." *Ysasi*, 856 F.2d at 1526.

Plaintiffs also present various recorded testimony of Hoffmann Jr. to the effect that he "was assured on many occasions by officials of the War Crimes Commission that when the Nürnberg proceedings against German industrialists were completed, the Hoffmann Photographic Archives at Nürnberg would be returned to Hoffmann Jr." Pl.'s Statement of Facts ¶ 21. This testimony, however, is unaccompanied by any allegations or evidence of such officials' authority to bind the United States Government. *See* Letter of Heinrich Hoffmann Jr., Ex. P-85 ("I repeatedly received confirmation from various persons that interest in [the archive] would only last for the duration of the Nuremberg Court Trials"); Letter of Heinrich Hoffmann Jr., Ex. P-109 (stating that "I was assured by U.S. officials at Nuremberg that my photo archives were regarded by the U.S. Army as a loan for the duration of the trials"); Dep. of Heinrich Hoffmann Jr., Ex. P-230, at 15

(stating that General Potter "gave me his word that when the books were finished, the entire archives would be brought to location which I would designate," but later received orders to ship the archives to the United States); Affidavit of Heinrich Hoffmann Jr. & Claus Offermann, Ex. P-244, at ¶ 11 (stating that Hoffmann "understood that the United States Government would conclude its use of the photographic archives and return them to him"). Accordingly, such testimony does not carry the burden of showing that an implied-in-fact contract was made. *Pasco Enterprises v. United States*, 13 Cl. Ct. 302, 306-07 (1987).

The court therefore finds that plaintiffs have failed to raise a genuine issue of material fact in support of the theory that an implied-in-fact bailment was created with respect to the Nürnberg photographic archives.

2. The Photographic Archives Not Subject to the Vesting Order

Plaintiffs assert that the Army also had control of the photographic archives not subject to the vesting order under an express or implied-in-fact bailment "with the fiduciary duties of accounting, returning, and compensating." Plaintiffs do not provide specific support for a finding that such bailments or fiduciary duties existed, but state simply that "[t]he same principles discussed *supra* respecting the archives made subject to the vesting order are applicable here." Pl.'s Br. Supp. Mot. Summ. J. at 118. Accordingly, the court finds that plaintiffs have failed to raise a genuine issue of material fact in support of the theory that an implied-in-fact bailment was created with respect to the photographic archives not subject to the vesting order.

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3. The Watercolors

Plaintiffs also allege that an implied-in-fact bailment was created when the Army took possession of the four Hitler watercolors upon occupying Schloss Dietramszell in 1945 and removed them to the Munich Central Collection Point in May 3, 1946. Pl.'s Statement of Facts ¶¶ 68, 76-77.

In support of this theory, plaintiffs do not allege that the government ever suggested or opined, let alone represented or promised, that the watercolors would someday be returned to the Hoffmanns. Instead, plaintiffs cite deposition testimony of Rosemarie Huber and Elga Bohm that the Munich Central Collection Point was established with the purpose of "identification and return of objects of arts to their rightful owners." Bohm Dep., Ex. P-239, at 10; see also Huber Dep., Ex. P-234, at 7 (testifying that objects of art were brought "to Munich to be registered here, and to be returned to the former owners"). Plaintiffs also paraphrase extensive passages from Lynn H. Nicholas, *The Rape of Europa*, for the proposition that the U.S. government had classified certain works of art as "property of the German nation or the private property of Germans" with the intention of serving as a "trustee" for all such property that was removed to the United States. Pl.'s Statement of Facts at 26-27 n.9.

Even in the light most favorable to plaintiffs, this evidence regarding the general purpose of the Munich Central Collection Point and the intention of the U.S. government with respect to a general category of property is insufficient to support the specific inference that the Army brought the four Hitler watercolors to the Munich Central Collection

Point with the intention of returning them to the Hoffmanns, let alone that such an intention was ever communicated to the Hoffmanns. Accordingly, the court finds that plaintiffs have failed to raise a genuine issue of material fact to support the finding of an implied-in-fact bailment with respect to the Hitler watercolors.

B. The Fifth Amendment Claims

Plaintiffs' takings claims are based on the proposition that "non-resident friendly aliens are also entitled to the protection of the Fifth Amendment's prohibition on unlawful taking for public use of their property in the United States without just compensation." See Pl. Br. Supp. Mot. Summ. J. at 102 (citing *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491 (1931)). In *Russian Volunteer Fleet*, the petitioner, a Russian corporation, was the assignee of certain contracts for the construction of two vessels by a New York shipbuilding corporation. 282 U.S. at 487. When the United States requisitioned these contracts, the Court held that the United States had exerted the power of eminent domain in taking the petitioner's property and thereby became bound to pay just compensation. *Id.* at 489.

In finding that the Russian Volunteer Fleet was an "alien friend," the Court cited *Wong Wing v. United States*, 163 U.S. 228 (1896), a case which, while affirming the power of Congress to exclude aliens on the basis of race (as race was then legally constructed), permitted Fifth and Sixth Amendment claims as minimal due process protections for those aliens who had already established residence in the United States. The more general proposition that *non-resident* friendly

aliens with no voluntary or contractual relationship with the United States are entitled to Fifth Amendment rights, however, was emphatically rejected by the Supreme Court in *Johnson v. Eisentrager*, 339 U.S. 763 (1950):

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our constitution has even hinted at it. The practice of every modern government is opposed to it.

Id. at 784; see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) ("Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.").

In *Verdugo-Urquidez*, the Court reviewed a series of cases, including *Russian Volunteer Fleet*, that had been cited by the respondent in support of the view that aliens enjoy certain constitutional rights. *Id.* at 270-71. The court concluded that "[t]hese cases . . . establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Id.* at 271. The respondent was "an alien who has had no previous significant voluntary connection with the United States, so these cases avail him not." *Id.*

Plaintiffs and their predecessors, self-described as "non-resident," have failed to establish the existence of voluntary or contractual relationships with this country that could reasonably be characterized as "substantial connections." Nor have plaintiffs alleged that the United States seized, vested or acquired any of the property pursuant to its eminent domain power. Accordingly, the court will dismiss plaintiffs' Fifth Amendment claims.

C. The Trading With the Enemy Act Claim

Plaintiffs challenge the validity of the vesting order under the Trading With the Enemy Act, 50 U.S.C. App. § 9. That statute provides that "[a]ny person not an enemy or ally of enemy claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him . . . may file with the said custodian a notice of his claim . . . ."

As the Fifth Circuit noted, § 33 of the Act bars claims under § 9 instituted "after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought." 69 F.3d at 53 (quoting 50 U.S.C. App. § 33 (1988)). Plaintiffs implicitly acknowledge this time bar. *See* Pl.'s Br. Supp. Mot. Summ. J. at 83 ("The only question that remains is can Hoffmann Jr. and von Schirach and their successors commence an action in 1989 when C.A. H-89-815 was filed in the Southern District of Texas?"). They argue, however, that "[n]o statute of limitations runs in favor of a fiduciary who steals or mistreats

the property entrusted to him so long as the fiduciary relationship is not expressly repudiated and such repudiation is communicated to the beneficiary by the malfeasor-fiduciary." *Id.* Whether or not this proposed rule of law is valid and applicable to § 33, plaintiffs have failed to offer facts that show the existence of a fiduciary relationship between the Army and Hoffmann Jr. regarding the vested property. Accordingly, the court finds that plaintiffs have failed to raise a genuine issue of material fact as to whether the validity of the vesting order can be reviewed.[2]

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2. While it is not necessary for the court so to find, plaintiffs' challenge to the vesting order itself appears to be without merit. Plaintiffs contend that vesting order authority under the Act extended only to property that was physically located in the United States prior to December 31, 1946, when President Truman signed a proclamation permitting the resumption of trade between Germany and the United States. Pl.'s Mem. Supp. Summ. J. at 75. The caselaw cited by plaintiffs, however, does not support this proposition. *See Cities Service Co. v. McGrath*, 342 U.S. 330, 333 (1952) (holding that vesting in of debentures physically located outside of the United States fell within "broad terms" of TWEA's vesting authority); *Rogers v. Smith*, 185 F. Supp. 401 (S.D. Ill. 1960) (same); *McGrath v. Agency of Chartered Bank*, 104 F. Supp. 964 (S.D.N.Y. 1952), *aff'd sub. nom. McGranery v. Agency of Chartered Bank*, 201 F.2d 368 (2d Cir. 1953) (same); *Silesian-American Corp. v. Clark*, 332 U.S. 469, 475-76 (1947) (holding that seizure of alien property in time of emergency is a proper exercise of the war power); *Handelsbureau La Mola v. Kennedy*, 299 F.2d 923, 926-27 (D.C. Cir.), *cert. denied*, 370 U.S. 940 (1962) (holding that December 1950 vesting order was proper because "enemy" status under TWEA did not end until the Joint Resolution of Congress of October 19, 1951); *Gmo Niehaus & Co. v. United States*, 170 F. Supp. 419, 421 (1959) (holding that property *acquired by Germans* after December 31, 1946 is not subject

(Cont'd)

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D. The Tort Claims

1. The Watercolors

In *Price*, the Fifth Circuit held that the Federal Tort Claims Act did not confer jurisdiction over a claim against the United States for conversion of the watercolors if an act "inconsistent with [Hoffmann]'s interest in his personal property"; i.e., the watercolors, occurred in Germany. 69 F.3d at 50. Upon reviewing the deposition testimony, submitted by Price, of a German citizen who processed art at the Munich Central Collection Point, the court determined that "other artwork in Hoffmann's collection — artwork not by Adolf

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(Cont'd)
to vesting). The Supreme Court in *Cities Service Co.* emphasized the breadth of the vesting authority:

> We believe that the Trading with the Enemy Act grants the authority necessary to vest obligations evidenced by domestic negotiable bearer debentures even though the debentures themselves are outside the United States. By s 7(c) of the Act, enacted during World War I, the President is given the authority to seize all enemy property, "including . . . choses in action, and rights and claims of every character and description owing or belonging to . . . an enemy . . . ." At the beginning of World War II, Congress made an even broader grant of authority to the Executive through an amendment to s 5(b), providing that "any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President . . . ."

342 U.S. at 333 (citations omitted).

Hitler, but similarly labeled 'Hoffmann' and found along with the Hitler watercolors and shipped to the central collecting point in Munich—was returned to Hoffmann's son at about the same time that the watercolors were confiscated." *Id.* at 51. For the court, the "crucial[ ]" fact was that the Army's conduct with respect to the watercolors diverged from its contemporaneous treatment of similarly situated art in a manner that was consistent with the owner's interest:

> The divergent treatment afforded various pieces of art in the Hoffmann collection convincingly establishes that the conversion of the watercolors, i.e., an act inconsistent with the Hoffmann family's interest in them, occurred when the United States military authorities ordered their transfer to Wiesbaden and their shipment to the United States.

Id. See Restatement of Restitution § 123 cmt. c, at 508 (1937) ("A person who, having acquired the property of another innocently and non-tortiously but without giving value therefor, learns of the interest of another therein, is under a duty to restore it to the owner within a reasonable time, [a]nd any conduct of his thereafter which is inconsistent with the owner's interest is a conversion . . . ."). The court's finding was further "buttressed to the extent that [the United States Army's rules of warfare] may have applied so as not to permit the lawful taking of these watercolors." *Id.* Accordingly, the Fifth Circuit concluded that the conversion claim did not fall within the waiver of sovereign immunity granted by the Federal Tort Claims Act. *Id.* at 52.

Under established principles of res judicata, this court is not empowered to review the Fifth Circuit's determination that federal courts lack subject matter jurisdiction over plaintiffs' claim for conversion of the watercolors. As the Supreme Court has long recognized, "[t]he principles of res judicata apply to questions of jurisdiction as well as to other issues." *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Association*, 455 U.S. 691, 706 (1982) (citing *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932)). Dismissal of a suit for lack of federal subject matter jurisdiction precludes relitigation of the same issue of subject matter jurisdiction in a second federal suit on the same claim. *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1411 (8th Cir. 1983). Accordingly, the court concludes that plaintiffs have failed to raise a genuine issue of material fact in support of relitigating the issue of jurisdiction under the Federal Tort Claims Act for conversion of the watercolors.[3]

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3. Plaintiffs contend that the Fifth Circuit's finding in *Price* was erroneous to the extent that the Fifth Circuit relied on the deponent's testimony that the watercolors were "confiscated" in Munich prior to their transfer to Wiesbaden and shipment to the United States. In support of this contention, plaintiffs have submitted new testimony to the effect that the word used by the German witness, "beschlagnahme," does not mean "confiscate" in the sense of state action to deprive of ownership, but rather should be translated "taken into possession." *See* Pl.'s Statement of Facts ¶ 72; Ex. P-402, ¶¶ 4-11. The court fails to see how even this translation disturbs the conclusion that the watercolors were never returned to the Hoffmanns, and were thereby afforded "divergent treatment" from that given contemporaneously to the artwork that was returned to Hoffmann Jr.

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2. The Photographic Archives Not Covered by the Vesting Order (Other Than the Time-Life Archives)

Plaintiffs' conversion claims for the photographic archives not covered by the vesting order are subject to the statute of limitations under the Federal Tort Claims Act, which provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b).

Plaintiffs contend that the claim for conversion for "most" of the archives not covered by the vesting order "accrued" when plaintiffs' "1983 and 1996 demands for the return of those archives were denied by the government" in January and February 1997. Pl.'s Br. Supp. Summ. J. at 138. A claim accrues within the meaning of § 2401(b), however, when the plaintiff becomes aware of both the existence and the cause of his injury. *United States v. Kubrick*, 444 U.S. 111, 117 (1979). In this case, plaintiffs' evidence indicates that on May 20, 1949, Hoffmann Jr. was aware of both the removal and the cause of the removal of the "entire Hoffmann file" to the United States. Hoffmann Jr.'s letter to the Army's Historical Division in Europe on June 17, 1949 states that:

> On 20 May 49 I was informed by Major Murphy, Historical Division, Frankfurt/Main, that my entire photo archive had been forwarded to Washington and I had no right to claim its return.

> Because of the foregoing, as owner, I am compelled to lodge protest.

See Pl.'s Statement of Facts ¶ 34; Ex. P-85. Making clear that by his "entire" archive Hoffmann Jr. was not merely referring to the Nürnberg archive, the same letter also states that "[o]ne part of the entire archive, the part that happened to be in the American zone of occupation, was removed to Nuremberg" and that "this part of the former entire archive is all that I have left after the war." Ex. P-85. The court concludes that plaintiffs' conversion claims for the photographic archives taken by the Army and not covered by the vesting order accrued on May 20, 1949. Because plaintiffs have alleged elsewhere that the Time-Life portions of the archives were not part of the archives taken and transported by the Army, however, the Time-Life archives are excluded from this determination. *See* Pl.'s Statement of Facts ¶¶ 48-51.

Plaintiffs also note that this "suit was filed within two weeks after the last rejection of the [1996] claim." Pl.'s Br. Supp. Summ. J. at 138. That an action seeking judicial review of a time-barred claim was filed promptly after an agency denial, however, does not suffice to resurrect the claim. The provisions of § 2401(b) are read conjunctively, as jurisdictional requirements, not disjunctively, as independent bases for jurisdiction. *Schuler v. United States*, 628 F.2d 199, 201 (D.C. Cir. 1980) (en banc) ("Though the section is not happily drafted, common sense and the legislative history tell us that it requires the claimant both to file the claim with the agency within two years after accrual of the claim and then to file a complaint in the District Court within six months

after the agency denies the claim."). Because there is no genuine issue of material fact as to when the claim for conversion of the archives not covered by the vesting order (other than the Time-Life archives) accrued, the court will grant summary judgment for defendants on the tort claims as to those archives.

3. The Time-Life Archives

Plaintiffs contend that Time-Life stole part of the Berlin portion of the Hoffmann Photographic Archives during the war and donated some or all of the stolen archives to the U.S. Army in 1981 and 1983, and that Hoffmann Jr. first learned of the existence of the stolen archives in early 1983. In support of these allegations, plaintiffs offer letters from employees of Time-Life Books and the United States Army Military History Institute indicating that in 1981 and 1983, the Institute accepted donations of some 7,000 "Heinrich Hoffmann prints" that had been "confiscated from Hoffmann's Berlin studio in May, 1945 by a LIFE magazine photographer." Ex. P-163, P-164, P-165, P-182A, P-183. Plaintiffs have also filed an affidavit from Hoffmann Jr. that he met Price in early 1983, learned of the stolen archives from Price, and verified that the archives stored at the institute were part of his father's Berlin archives. Ex. P-244 at ¶¶ 19, 20. Finally, plaintiffs have submitted a written FTCA claim filed by Price and Hoffmann Jr. with the Houston office of the Department of Justice Civil Division on May 10, 1984. Ex. P-208; Consolidated Complaint ¶ 87.

Defendants do not contest these facts or contend that plaintiffs' claims regarding the Time-Life Archives are barred

by the statute of limitations. Defendants correctly note, however, that each and every claimant is required to file an administrative claim in order to pursue a tort claim under the FTCA. *See Pipkin v. United States Postal Service*, 951 F.2d 272, 273 (10th Cir. 1991) (barring wife's claim for failure to exhaust administrative remedies, even though husband had filed an administrative claim). Plaintiffs have therefore conceded that the Estate of Henriette Hoffmann von Schirach may not recover for the Time-Life Archives in this action. Pl.'s Br. Supp. Mot. Summ. J. at 178.

Defendants also contend that plaintiffs' claims for the Time-Life archive should be dismissed because they have already been the subject of the settlement of a civil action by plaintiffs against Time, Inc. Pl.'s Resp. to Def.'s Req. for Admission 22(a). Defendants assert that plaintiffs "have refused to disclose either the facts underlying their claim, or the terms of the settlement." Def.'s Mem. Supp. Renewed Mot. Summ. J. at 12 n.6. Plaintiffs have not responded to this assertion. Because "a final judgment, whether arrived at by way of a settlement agreement or an adjudication on the merits, does extinguish a party's claim to remedies pertaining to 'all or any part of the transaction, or series of connected transactions, out of which the action arose,' " *Hydrocarbon Trading & Transport Co., Inc. v. Dep't of Energy*, 1995 WL 317424, at *5 (D.D.C. 1995) (quoting Restatement (Second) of Judgments § 24 (1982)), defendants are entitled to know the facts underlying plaintiffs' claim for the Time-Life archives and the terms of the settlement with Time, Inc..

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4. The Vested Archives

Plaintiffs allege that "Government employees and others unknown conspired prior to the issuance of the void vesting order to convert the Hoffmann Photographic Archives and thus committed the tort of conspiracy," Pl.'s Br. Supp. Summ. J. at 107, and then fraudulently concealed this conspiracy. Consolidated Complaint ¶ 123. According to plaintiffs, the substantive offense underlying this conspiracy was the alleged breach of the Army's fiduciary duties to return the Hoffmann Photographic Archives and to pay for Hoffmann's loss of use. *Id.* at 108. Because plaintiffs have failed to offer evidence that would permit the review of the validity of the vesting order or support the finding of such fiduciary duties, summary judgment will be granted against the conspiracy claims and, a fortiori, the fraudulent conspiracy claims.

IV. Conclusion

For the foregoing reasons, it is this 28th day of June, 1999, hereby

ORDERED that defendants' motion for summary judgment is **GRANTED** as to counts 3, 4, 9, 10, 11, 12, 14, 16 and 18 of the Consolidated Complaint; and it is further

ORDERED that defendants' motion for summary judgment is **DENIED** as to counts 13 and 15 of the Consolidated Complaint; and it is further

ORDERED that the clerk shall schedule a status hearing to address the procedure to be followed to determine whether the settlement of the plaintiffs' litigation against Time-Life, Inc. precludes plaintiffs' claims regarding the Time-Life Archives.

s/ Henry H. Kennedy, Jr.
Henry H. Kennedy, Jr.
U.S. District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED SEPTEMBER 9, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 98-00857

HENRIETTE HOFFMAN VON SCHIRACH, ROBERT H. HOFFMAN, HEIDEMARIE KRUGER and SUSANNE HUSTADT,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

The court has been advised by plaintiffs' counsel that plaintiffs have chosen to relinquish their claims to the items referenced in the court's June 28, 1999, Memorandum Opinion as the Time Life Archive. Consequently, pursuant to Fed. R. Civ. P. 58 and for the reasons stated by the court in its Memorandum Opinion, it is on this 9th day of September, 1999, hereby

ORDERED and ADJUDGED that judgment is entered for the defendant; and it is further

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ORDERED and ADJUDGED that the complaint in this case is dismissed with prejudice.

s/ Henry H. Kennedy, Jr.
Henry H. Kennedy, Jr.
United States District Judge

Dated: 9/9/99

APPENDIX E — OPINION ON ASSIGNMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED AND ENTERED MARCH 24, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CIVIL ACTION H-89-0815

BILLY F. PRICE, *et al.*

versus

UNITED STATES OF AMERICA

Opinion on Assignment

Billy F. Price seeks an order that the United States turn over to him four watercolors painted by Adolf Hitler and photographic archives originally belonging to Henrich Hoffmann and his son. A judgment in Price's favor was reversed and the case was remanded by the Fifth Circuit. *Price v. United States*, 69 F.3d 46 (5th Cir. 1995), *cert. denied*, 117 S. Ct. 295 (1996).

1. *The Fifth Circuit Mandate.*

On December 12, 1996, the court of appeals entered an order staying discovery pending a ruling on the government's motion to dismiss. In its December 12 order, the court of appeals stated:

> If it is true — as the government argues — that Price is improperly joined as a plaintiff in this lawsuit in violation of the Anti-Assignment Act, 31 U.S.C. § 3727, the district court does not have authority to entertain the dispute between the remaining parties in this venue. Because of the likelihood that Price is improperly joined as a plaintiff and, therefore, that venue is improper, we are compelled to order the district court to rule on the government's motion to dismiss Price as a plaintiff prior to allowing the plaintiffs to proceed with their discovery requests. . . . [W]e note that if it is true that plaintiff Price was assigned a "claim" as opposed to a "judgment" in this action, it is difficult to ascertain, in light of the Anti-Assignment Act, how Price can remain a plaintiff and how the district court can then remain a proper venue of this action. Therefore, upon considering the government's motion to dismiss, it may become necessary for the district court to reconsider its decision denying the government's motion to change venue.

In re United States of America, No. 96-21307 (5th Cir., Dec. 12, 1996).

2. *The Anti-Assignment Act.*

A transfer or assignment of a claim against the United States "may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." Title 31, United States Code, Section

3727. The purpose of the Anti-Assignment Act is "to prevent possible multiple payment of claims, to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant." *United States v. Aetna Casualty and Surety Co.*, 338 U.S. 366, 373 (1949). A claim against the United States under the Anti-Assignment Act is any right to demand money or property from the United States. *Rosecrans v. William S. Lozier, Inc.*, 142 F.2d 118, 124 (8th Cir. 1944).

The United States has had possession of the watercolors and a large part of the photographic archives since the late 1940's. Time, Incorporated had possession of part of the photographic archives beginning in the late 1940's, and transferred possession to the United States in 1981 and 1983. At the time the German plaintiffs transferred their interest in the property to Price, all parties knew that the property was in the possession of the United States. The Letter Agreement for the sale and assignment of the photographic archives to Price specifically assigns "such claims for damages as each of you individually has in your own right and on behalf of your deceased father with regard to all of those archives."

An assignee can prevail only if the government's taking occurred while he was the owner of the property because compensation is due at the time of the taking. *United States v. Dow*, 357 U.S. 17, 20 (1958); *United States v. 717.42 Acres of Land*, 955 F.2d 376, 379 (5th Cir. 1992). It is undisputed that Price was not the owner of the property at issue at the time the United States assumed possession and control. As a result, Price's joinder as a plaintiff is a violation of the Anti-Assignment Act.

Price argues that the German plaintiffs assigned the property to him, not merely the claims against the government. A similar situation was presented in *United States v. Shannon*, 342 U.S. 288 (1952). The owner of property damaged by United States soldiers in 1945 sold the property in 1946. The purchasers filed a tort action against the United States for the property damage. The Supreme Court held that the purchasers' claim against the United States was barred by the Anti-Assignment Act. *Id.* at 290-91. Additionally, the court of appeals stated in its January 1996 mandate that Price's claims were likely barred by the Anti-Assignment Act if he "was assigned a 'claim' as opposed to a 'judgment.' "

Price was not the property owner at the time the United States took the property. The transfer and assignment of the German plaintiffs' interests in the property may be valid as between them and Price. *See Segal v. Rochelle*, 382 U.S. 375 (1966) (Anti-Assignment Act does not render the assignment void as between the parties). His claims against the United States, however, are barred by the Anti-Assignment Act and will be dismissed.

3. *Motion to Transfer Venue.*

The court of appeals suggested that, if Price were dismissed as a plaintiff, the Court should reconsider the government's motion to transfer venue to the District Court for the District of Columbia. The plaintiffs have also filed a conditional motion to transfer venue.

Price was this case's only connection with the Southern District of Texas. The remaining plaintiffs are German

nationals or entities, and their claims would have arisen in the District of Columbia. Venue in this judicial district is improper. 28 U.S.C. § 1402. The case will be transferred to the United States District Court for the District of Columbia. 28 U.S.C. § 1406.

4. *Conclusion.*

Price's claims against the United States are barred by the Anti-Assignment Act. Price must be dismissed as a plaintiff. Without Price as a plaintiff, venue in this district is improper. The case will be transferred to the District of Columbia.

Signed March 24, 1998, at Houston, Texas.

s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX F — TRANSFER ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED AND ENTERED MARCH 24, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CIVIL ACTION H-89-0815

BILLY F. PRICE, *et al.*

versus

UNITED STATES OF AMERICA

Transfer Order

Billy F. Price is dismissed as a plaintiff (#86), and the case is transferred to the United States District Court for the District of Columbia (#51, #90). All remaining motions are denied with leave to refile in the Washington, D.C. court.

Signed March 24, 1998, at Houston, Texas.

s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX G — CONSTITUTIONAL PROVISION, STATUTES, CONVENTIONS AND PRESIDENTIAL MESSAGE INVOLVED

U.S. Constitution, Fifth Amendment

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

Title 28, Judiciary and Judicial Procedure

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

* * *

28 U.S.C. § 1346(a)(2) and (b)(1)

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

* * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States,

if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * *

28 U.S.C. § 1367(a)

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

* * *

Title 31, Money and Finance,
31 U.S.C. § 3727(a) and (b)

§ 3727. Assignments of claims

(a) In this section, "assignment" means —

> **(1)** a transfer or assignment of any part of a claim against the United States Government or of an interest in the claim; or

(2) the authorization to receive payment for any part of the claim.

(b) An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. The assignment shall specify the warrant, must be made freely, and must be attested to by 2 witnesses. The person making the assignment shall acknowledge it before an official who may acknowledge a deed, and the official shall certify the assignment. The certificate shall state that the official completely explained the assignment when it was acknowledged. An assignment under this subsection is valid for any purpose.

* * *

Title 44, Public Printing and Documents, 44 U.S.C. § 1508

§ 1508. Publication in Federal Register as notice of hearing

A notice of hearing or of opportunity to be heard, required or authorized to be given by an Act of Congress, or which may otherwise properly be given, shall be deemed to have been given to all persons residing within the States of the Union and the District of Columbia, except in cases where notice by publication is insufficient in law, when the notice is published in the Federal Register at such a time that the period between the publication and the date fixed in the notice for the hearing or for the termination of the opportunity to be heard is —

(1) not less than the time specifically prescribed for the publication of the notice by the appropriate Act of Congress; or

(2) not less than fifteen days when time for publication is not specifically prescribed by the Act, without prejudice, however, to the effectiveness of a notice of less than fifteen days where the shorter period is reasonable.

* * *

Appendix G

ANNEX to the HAGUE CONVENTION (IV) Adopted by the Geneva Protocols of 1929 Regulations Respecting the Laws and Customs of War on Land

* * *

ARTICLE 23.

In addition to the prohibitions provided by special Conventions, it is especially forbidden —

* * *

g. To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

* * *

ARTICLE 28.

The pillage of a town or place, even when taken by assault, is prohibited.

* * *

ARTICLE 46.

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.

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ARTICLE 47.

Pillage is formally forbidden.

* * *

ARTICLE 52.

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in operations of the war against their country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

ARTICLE 53.

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for operations of the war.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of

persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

* * *

ARTICLE 55.

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

ARTICLE 56.

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure or destruction of, or wilful damage to, institutitions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

* * *

Appendix G

U.S. WAR DEPARTMENT
(1940)
Rules of Land Warfare

* * *

313. Destruction and seizure of. — It is especially forbidden * * * to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war *(H.R., art. 23, par. (g))*.

314. General rule as to war right to seize and destroy property. — The rule is that in war a belligerent may destroy or seize all property of whatever nature, public or private, hostile or neutral, unless such property is specifically protected by some definitive law of war, provided such destruction or seizure is imperatively demanded by the necessities of war.

* * *

318. Property of municipalities, etc. — The property of municipalities, that of institutions dedicated to religion, charity, and education, the arts and sciences, even when State property, shall be treated as private property.

All seizures of, destruction, or willful damage done to institutions of this character, historic monuments, works of art, science, is forbidden and should be made the subject of legal proceedings *(H.R., art. 56)*.

* * *

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320. Movable property. — An army of occupation can only take possession of cash funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations *(H.R., art. 53, par. 1)*.

321. Two classes of movable property. — All movable property belonging to the State directly susceptible of military use may be taken possession of as booty and utilized for the benefit of the invader's government. Other movable property, not directly susceptible of military use, must be respected and cannot be appropriated.

322. Property of unknown ownership treated as public property. — Where the ownership of property is unknown — that is, where there is any doubt as to whether it is public or private, as frequently happens — it should be treated as public property until ownership is definitely settled.

PRIVATE PROPERTY

323. Must be respected — Private property * * * must be respected *(H.R., art. 46, par. 1)*.

324. Devastation. — The measure of permissible devastation is found in the strict necessities of war. As an end in itself, as a separate measure of war, devastation is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army. Thus the rule requiring respect for private property is not violated through damage

resulting from operations, movements, or combats of the army; that is, real estate may be utilized for marches, camp sites, construction of trenches, etc. Buildings may be used for shelter for troops, the sick and wounded, for animals, for reconnaissance, cover defense, etc. Fences, woods, crops, buildings, etc., may be demolished, cut down, and removed to clear a field of fire, to construct bridges, to furnish fuel if imperatively needed for the army.

* * *

326. Confiscation. — Private property cannot be confiscated *(H.R., art. 46, par. 2)*.

* * *

329. Pillage. — Pillage is formally forbidden *(H.R., art. 47)*.

330. Seizure and devastation of private property. — Private property can be seized only by way of military necessity for the support or other benefit of the army or of the occupant. All destruction of property not commanded by the authorized officer, all pillage or sacking, even after taking a town or place by assault, are prohibited under the penalty of death or such other severe punishment as may seem adequate to the gravity of the offense.

331. Private property susceptible of direct military use. — All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law,

depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is declared *(H.R, art. 53, par. 2)*.

* * *

REQUISITIONS

335. Requisitions. — Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible *(H.R., art. 52)*.

* * *

Appendix G

2 International Law
(Department of the Army Pamphlet
27-161-2 (1962))

* * *

III. PROPERTY IN OCCUPIED AREAS

A. Military Commander's Power Over Property in Occupied Areas

The powers which a military commander may exercise over property in enemy territory may be classified broadly as destruction, confiscation, seizure, requisition, and control. An analysis of the nature of each of these powers will illustrate the lawful extent to which each may be exercised.

1. *Destruction.* Destruction is the partial or total damage of property. Property of any type or ownership may be damaged where such is necessary to, or results from, military operations either during or preparatory to combat. Destruction is forbidden except where there is some reasonable connection between the destruction of the property and the overcoming of the enemy army. Two treaties have specifically laid down rules as to destruction, Article 23(g) of the Hague Regulations, and Article 53 of the Geneva Civilian Convention.

a. *Article 23 (g), The Hague Regulations.*

> It is especially forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

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This rule covers all property in any territory involved in a war, whether that property is in occupied territory or not, and whether that property is publicly or privately owned. Paragraph 56, FM 27-10, should be construed as illustrating only a part of the destruction permissible under Art. 23(g), *H.R.* The acts listed in paragraph 56, FM 27-10 apply to hostilities or to invasion. However, they are not the direct result of hostilities itself, such as damage from explosives but are rather acts done incidental to or in preparation for fighting (such as the use of real estate as a camp site, or as a path of march, the use of buildings as forts or hospitals, the demolition of crops, buildings, or roads in order to make a landing strip, clear a field of fire, or furnish fuel). They therefore furnish a guide to the permissible destruction in occupied areas.[79] FM 27-10 offers further assistance to permissible destruction in occupied areas by authorizing the destruction of enemy fortifications and stores located in an area which has surrendered.[80]

Article 23(g) *H.R.* has been supplemented as far as occupation is concerned by Art. 53 of the 1949 Geneva Civilian Convention.

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79. Para. 56 is the same as para. 324 of FM 27-10 (1940). It was moved from the section on private property in occupied areas in the 1940 edition to a spot in the 1956 edition more appropriate to acts committed in actual combat.

80. FM 27-10, para. 41.

2. *Confiscation.* Confiscation is the taking of enemy public movable property without obligation to compensate the State to which it belongs. The term only applies to *public* property because *H.R.* Art. 46 specifically forbids the confiscation of private property.[85] It is further limited to public *movable* property because *H.R.*, Art. 55 permits the Occupant to act only as an administrator and usufructuary of public immovable property. The restrictions on confiscation apply only to occupied areas and to the battlefield, not to the domestic territory of the parties.

All enemy public movable property captured or found on a battlefield may be confiscated.[86] However, only certain

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85. An exception is made to the rule that private property may not be confiscated by permitting confiscation of certain items of private property found on the battlefield (FM 27-10, para. 59 *b*). With the depth and fluidity of modern battle zones it is sometimes difficult to determine when an area becomes or ceases to be a "battlefield" thereby increasing the danger that this exception may partly undermine the Hague prohibition. Such private property is called "booty of war." See JAGW 1956/8332 (9 Nov. 1956 wherein the opinion is expressed that Goering's heavily armored car equipped with bullet proof glass taken on the battlefield could be confiscated. In JAGW 1957/5906 (15 July 1957) the question arose whether or not expensive Hungarian horses now in the United States were "found on the battlefield." An extension of this idea of "booty" may be observed in JAGA 1947/5986, JAGW 1957/2121, and JAGW 1957/1052, wherein the opinion is expressed that field marshals' batons could be confiscated in cases where they were adorned with swastikas and were generally symbolic of the Nazi Party.

86. FM 27-10, para. 59 a. Public property so found is also termed "booty of war." On "booty" generally see Freeman, "General Note on the Law of War Booty," 40 *AJIL* 795; and Smith, "Booty of War," 23 *Brit. Year Bk. of IL* 227 (1946).

categories of public movable property may be confiscated in occupied areas. *H.R.*, Art. 53(1) lists the items which can be confiscated in occupied territory.

> An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and generally all movable property belonging to the State which may be used for military operation.

Such public movable property need not be directly usuable for military operations, as ammunition, but includes property indirectly serving the same purpose. In modern total war military value can be found in a great many items. However, if the property cannot be used either directly or indirectly for military operations it cannot be confiscated.

3. *Seizure*

a. *Its nature and limitations.* Seizure is the taking of certain types of enemy *private* movable property for use of the capturing State. Such use is not confined to the needs of the occupying army. Items seized may be employed outside as well as within the occupied territory. The items seized must be returned or compensation fixed when peace is made. This is one of the principal differences between seizure and confiscation.

The concept of seizure does not apply to public property because movable public property of a military value may be confiscated. Public immovable property can only be administered, title remaining always in the enemy State.

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The concept also does not apply to private immovable property. "Immovable private property may under no circumstances be seized."[87] This general rule, which appears absolute, is however modified in the case of railway plants, port facilities, airfields, and telephone and telegraph plants, all of which are closely connected with communication and transportation systems.[88]

Article 53 (2), *H.R.* lists the types of private movable property which may be seized. They are (1) appliances adapted to the transmission of news; (2) transportation; (3) depots of arms and all kinds of ammunition of war. The seizure of this property is not based, as in the case of requisitions, on the needs of the army of occupation but on the danger of permitting property susceptible of direct military use to remain at the disposal of private individuals.

Appliances adapted to the transmission of news include cables, radios, television and telecommunications equipment.[89]

Appliances adapted as a means of transportation include motor vehicles, railways, ships in port, barges and other watercraft, and aircraft.

Arms and munitions of war include all varieties of military equipment, including that in the hands of manufacturers, component parts of or material suitable only

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87. FM 27-10, para. 407.

88. FM 27-10, para. 410 *a*.

89. Id.

for use in the foregoing, and in general all kinds of war materials.[90] It will be noted that many items that could be extremely useful to a State at war are not included. Such items in occupied areas are heavy industry not yet converted to war production, crude oil, and other petroleum products. Efforts to interpret broadly the term of the Hague Regulations "ammunition of war" have not been successful.[91] Private property subject to seizure remains limited by the 1907 Hague Regulations.

(b) *Cases growing out of seizures in World War II.*

(1) *United States v. Krupp*[92]

In the early part of 1941 the German High Command instituted a new submarine building program, which was participated in by the Krupp subsidiary of the Krupp Stahlban in Reinhausen. One of the managers of this plant was sent to France in the company of a naval officer of the Armament Inspectorate of the Navy High Command in order to find bending roll machines of greater dimensions than were available at the Krupp plants. They immediately placed "seized" signs upon the machines. The director of the Alsthom plant objected on the ground that the machines were the only ones suitable for the construction of boiler drums

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90. Id.

91. See Lauterpacht, "Hague Regulations and the Seizure of Munitions de Guerre," 32 *Brit. Year Bk. of IL* 218 (1955).

92. 10 *Law Reports of Trials of War Criminals*, pp. 88, 89., IX *Trials of War Criminals*, pp. 1358-1361.

and high pressure tubes. Neither had been used for military purposes. The objections raised to the seizure were of no avail and shortly afterwards the machines were dismantled by Krupp workmen and carried off to Germany. They were used in the submarine building program until the end of the war when they were found and finally brought back to the Alsthom plant. The removal and detention of those machines was considered a violation of Article 46 of the Hague Regulations.

(2) *United States v. Flick et al*[93]

Flick was the principal proprietor and active head of a large group of industrial enterprises including coal and iron mines and steel producing plants. He and some of his associates were tried after World War II for the unlawful seizure and exploitation of public and private property in occupied territory. Excerpts from the judgement of the court are as follows:

". . . Flick and his assistants Weiss, Burkart and Kaletsch are accused of exploiting properties which for convenience during the trial have been called Rombach in Lorraine; Vairogs in Latvia; and Dnjepr Stahl [Dnepr Steel], in the Ukraine. . . .

* * * * * * * * * * * * * * * * * *

93. VI *Trials of War Criminals*, pp. 1187-1123, at pp. 1202-1212. *Annual Digest 1947*, pp. 266-274; IX *LRTWC* 1-59. See also *U.S. v. Krauch* (I. G. Farben Inc.) VIII *Trials of War Criminals* pp. 1128-1167 for the seizure of private chemical industries in occupied areas.

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"Prior to the First World War when Lorraine was German, a large plant was built by German capital near the town of Rombach. After that war it was expropriated by France from whom the title was acquired by a French corporation dominated by the Laurent family. The enterprise consisted in 1940 principally of blast furnaces, Thomas works, rolling mills and cement works. . . . When the German Army invaded Lorraine in 1940, the management fled but many of the workers including technicians remained. . . . In any event a public commissioner or administrator was appointed for the Rombach plant and ultimately executed a contract with the Friedrich Flick Kommanditgesellschaft called 'use of enterprise conveyance agreement' dated 15 December 1942 but effective as of 1 March 1941 when the Flick group took possession. . . . Flick, had the hope of ultimately acquiring title to the respective properties and this trusteeship was sought to that end. . . . At no time, however, was there any definite sale commitment and of course the hope of its realization was frustrated by the fortunes of war. . . . A corporation called Rombacher Huettenwerke, G.m.b.H, was organized by Flick to operate the plant. . . . All the profits were invested in repairs, improvements and new installations. . . . The evidence satisfied us that the trustee left the properties in better condition than when they were taken over. . . .

"The seizure of Rombach in the first instance may be defended upon the ground of military necessity. The possibility of its use by the French, the absence of responsible management and the need for finding work for the idle population are all factors that the German authorities may have taken into consideration. Military necessity is a broad term. Its interpretation involves the exercise of some

discretion. If after seizure the German authorities had treated their possession as conservatory for the rightful owners' interest, little fault could be found with the subsequent conduct of those in possession.

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". . . Flick saw the possibilities resulting from the invasion and sought to add the Rombach property to his concern. But governmental policy was otherwise. It does not appear upon what grounds this decision was based. There may have been thought of the Hague Regulations under which private property must be respected and cannot be confiscated. But we recall no hint in the evidence that Flick or his associates gave any thought to the international law affecting the transaction. The Flick management of Rombach was conservative, not, however, with the intent of benefiting the French owners. . . . His expectation of ownership caused him to plow back into the physical property the profits of operation. . . .

* * * * * * * * * * * * * * * * * *

" While the original seizure may not have been unlawful, its subsequent detention from the rightful owners was wrongful. For this and other damage they may be compensated. . . .

". . . In this case Flick's acts and conduct contributed to a violation of Hague Regulation 46 that is, that private property must be respected. Of this there can be no doubt. But his acts were not within his knowledge intended to

contribute to a program of 'systematic plunder' conceived by the Hitler regime and for which many of the major war criminal have been punished. . . .

". . . They [Hague Regulations] were written in a day when armies traveled on foot, in horse-drawn vehicles and on railroad trains; the automobile was in its Ford model-T stage. Use of the airplane as an instrument of war was merely a dream. The atomic bomb was beyond the realms of imagination. Concentration of industry into huge organizations transcending national boundaries had barely begun. Blockades were the principal means of 'economic warfare.' 'Total warfare' only became a reality in the recent conflict. These developments make plain the necessity of appraising the conduct of defendants with relation to the circumstances and conditions of their environment. Guilt, or the extent thereof, may not be determined theoretically, or abstractly. Reasonable and practical standards must be considered.

". . . The Tribunal will find defendant Flick guilty in respect to the Rombach matter but will take fully into consideration in fixing his punishment all the circumstances under which he acted.

* * * * * * * * * * * * * * * * *

"Vairogs and Dnjepr Stahl have similar factual situations. The former was a railroad car and engine factory in Riga, once owned by a Flick subsidiary, sold to the Latvian State about 1936 and expropriated in 1940 as the property of the Soviet Government. Dnjepr Stahl was a large industrial group

— three foundries, two tube plants, a rolling mill, and machine factory — also owned by the Russian Government. These plants had been stripped of usuable movables when the Russian Army retreated eastward and further steps had been taken to render them useless to the Germans. Dnjepr Stahl particularly had been largely dismantled and immovables seriously damaged or destroyed. Over one million Reichsmarks of German funds at Vairogs and 20 million at Dnjepr Stahl were spent in reactivating the plants. They were in the possession of Flick subsidiary companies as trustees, the former for less than 2 years, beginning in October 1942, the latter for the first 8 months of 1943.

". . . When the German civilians departed all plants were undamaged and in the absence of evidence to the contrary we may assume so remained when the Russians returned.

"The only activity of the individual defendants in respect to these industries was in negotiating the procurement of trustee contracts. . . .

"These activities stand on a different legal basis from those at Rombach. Both properties belonged to the Soviet Government.

The Dnjepr Stahl plant had been used for armament production by the Russians. The other was devoted principally to production of railroad cars and equipment. No single one of the Hague Regulations above quoted is exactly in point, but, adopting the method used by IMT, we deduce from all of them, considered as a whole, the principle

that state-owned property of this character may be seized and operated for the benefit of the belligerent occupant for the duration of the occupancy. The attempt of the German Government to seize them as the property of the Reich of course was not effective. Title was not acquired nor could it be conveyed by the German Government. The occupant, however, had a usufructuary privilege. Property which the government itself could have operated for its benefit could also legally be operated by a trustee. We regard as immaterial Flick's purpose ultimately to acquire title. To covet is a sin under the Decalogue but not a violation of the Hague Regulations nor a war crime. We have already expressed our views as to the evacuation of movables from these plants. Weiss congratulated the manager of Vairogs upon his success in moving out machinery and equipment. In this we see nothing incriminating since Weiss neither had nor attempted to exercise any control of the evacuation and learned of it only after it was accomplished. We conclude, therefore, that there was no criminal offence for which any of the defendants may be punished in connection with Vairogs and Dnjepr Stahl."

(3) *Singapore Oil Stocks.*[94] When the Japanese occupied the Netherlands East Indies in 1942 they seized the crude oil stocks of private oil companies. This oil, which had to be pumped out of the ground and refined, was transferred out of the occupied area and used to further the Japanese war efforts in other parts of Asia. After the war, some of this refined oil was found stored in Singapore. The

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94. *N.V. De Bataafsche Petroleum Maatschappli and Ors. v. The War Damage Commission*, reproduced in 51 *American Journal of International Law* 802 (1957).

British confiscated it as "booty of war." The private oil companies contested this act on the part of Britain on the ground that the Japanese had no title to this on which the British could obtain. The Court concluded as follows:

"The seizure of the oil resources of the Netherlands Indies was economic plunder, the crude oil in the ground was not a '*munitions-de-guerre.*' The court also held that any Netherlands Indies law which operated to vest title in the refiner, here the Japanese could not purge the Japanese of their original violation of the Hague Regulations. Therefore judgment was given to the private owners.

4. *Requisition.* Requisition is the method of taking private enemy movable *and* immovable property for the needs of the army of occupation. It differs from seizure in four respects. (a) The items taken by requisition may be used only in the occupied territory. (b) Practically everything may be requisitioned that is necessary for the day-to-day maintenance of the army of occupation. The power to requisition is not limited to certain classes of property as is seizure. (c) Private immovable as well as private movable property may be requisitioned. Only private movable property may be seized. (d) The owners are to be compensated as soon as possible. They do not have to wait for the restoration of peace.[95]

* * *

5. *Control.* All property within occupied territory may be controlled by the occupant to the degree necessary to

95. *H.R.*, Art. 52, and *GC* Art. 55, define the powers of the occupation authorities in regard to requisitions.

prevent its use for the benefit of the enemy or in a manner harmful to the occupant.[101] Property control is temporary in nature. The property must be returned to the owners when the reason for the control no longer exists. Therefore, the control must not extend to confiscation, whether such confiscation is accomplished by outright taking, or by subtler methods such as forced sales and depletion.

Control may also be exercised over property of unknown ownership or over property of individuals who are not present to care for it themselves.

The authority of the occupant to impose such controls does not limit its power to confiscate, seize or requisition certain property. The power to control is broader than these three concepts.[102]

* * *

101. FM 27-10, para. 399.

102. See Military Government Law No. 52. "Blocking and Control of Property," (Military Government Gazette, Germany, 1 June 1946, pp. 24-27) for a comprehensive attempt to control property transactions in an occupied area. German Supreme Court held on 24 June 1957 that MG Law 52 was designed to protect the property interests of the owner as well as the security of the occupant (Case digested in 63 *Am. J. Int'l L.* 457 (1957)).

Appendix G

President Truman's message of July 9, 1951
(1951 U.S.C.C.A.N. 2358-2359)

Furthermore, it is not intended that the termination of the state of war shall in any way change or alter the program, which Congress has authorized, of seizing, under the Trading With the Enemy Act, German property in this country on or before December 31, 1946, and using the proceeds to pay just and legitimate claims arising from the war in accordance with the War Claims Act of 1948. The vesting of German property under this program does not extend to property acquired since the resumption of trade with Germany on January 1, 1947, following the cessation of hostilities. It is limited to German property and rights located here before or during the period of hostilities.

Most of this German property has already been identified and vested. This Government does not intend to embark on any new program in this field. However, some of the property already subject to vesting [since it was in the United States before December 31, 1946] is believed to be cloaked or hidden and not yet discovered, and some is still under examination or subject to legal proceedings. Most of the property remaining unvested is involved in problems of conflicting jurisdiction between this and other governments, which are in the process of settlement by negotiation under authority of legislation which was enacted in September of last year.

Should the vesting power lapse immediately, this Government would find it difficult to wind up this program in an orderly way, or to carry out its commitments for the equitable

settlement of intergovernmental differences relating to enemy property.

Completion of the vesting of wartime enemy property, even after the conclusion of peace, is commonly accepted practice in connection with the settlement of claims between the nations which were at war. Our peace treaties with Bulgaria, Hungary, Rumania, and Italy all authorize the continued vesting and retention of such property.

In the absence of treaty provisions, however, there may be legal obstacles to the continued vesting of German property, after the termination of the state of war, unless there are changes in our existing statutes. According to the terms of the Trading With the Enemy Act, many of its powers expire at the "end of the war," a phrase which the act defines to mean the date of proclaiming the exchange of ratifications of a treaty of peace, or an earlier date fixed by Presidential proclamation. There is some doubt that the vesting powers of the Trading With the Enemy Act can be exercised after the termination of the state of war, unless expressly provided for in new legislation.

This doubt should be eliminated, and it should be made clear that the Congress intends the vesting of German property for the purpose of paying war claims to continue.

Supreme Court, U.S.
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No. 01-1111

In the Supreme Court of the United States

ROBERT H. HOFFMANN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners may assert any valid claim against the United States with respect to paintings by Adolf Hitler and a photographic archive that were owned by one of Hitler's associates and seized in Germany at the end of World War II.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-22a) is not reported in the Federal Reporter, but is published at 17 Fed. Appx. 980. The opinion of the court of appeals on rehearing (Pet. App. 1a-4a) is unreported. The memorandum opinion of the United States District Court for the District of Columbia (Pet. App. 23a-49a) is reported at 53 F. Supp. 2d 483. The opinion of the United States District Court for the Southern District of Texas (Pet. App. 52a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2001. A petition for rehearing was denied on November 6, 2001 (Pet. App. 4a). The petition for a writ of certiorari was filed on January 29, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves claims with respect to four watercolors painted by Adolf Hitler, which were acquired from him by his personal photographer, Heinrich Hoffmann, and to a photographic archive compiled by Hoffmann and his son, which contains images from the Third Reich. The claims relate both to an archive that was vested in the United States in 1951 (the "vested" archive) and to an additional archive that petitioners allege is in the United States' possession (the "missing" or "non-vested" archive). See Pet. App. 8a, 24a-29a; *Price* v. *United States*, 69 F.3d 46, 48-50, modified on reh'g, 81 F.3d 520 (5th Cir. 1995), cert. denied, 519 U.S. 927 (1996).[1]

At the end of World War II, the United States Army discovered the watercolors and photographic archive in Germany, and took possession of them. The watercolors were transferred to the United States in 1945. The photographic archive was used during the Nuremberg War Crimes Trials. In 1951, the United States Office of Alien Property vested ownership of the archive in the Attorney General pursuant to the Trading with the Enemy Act, 50 U.S.C. App. 41, 42. Vesting Order No. 17,952, 16 Fed. Reg. 6162 (1951) (Vesting Order). See Pet. App. 8a; *Price*, 69 F.3d at 48-52, 54.

The plaintiffs below, and petitioners here, are five citizens and residents of Germany, who claim to be the heirs of Hoffmann and the owners of the watercolors

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[1] Petitioners relinquished their claims against the United States with respect to a distinct Hoffmann archive given to the United States in the early 1980s by Time-Life Inc. See Pet. App. 11a, 50a-51a. Consequently, this brief will not describe the lower courts' rulings with respect to that archive.

and photographic archive, and Billy F. Price, an American businessman who claims to have purchased the legal rights to those properties from Hoffmann's heirs. See Pet. App. 5a-6a; *Price*, 69 F.3d at 48-50.

2. In 1983, petitioners filed their original complaint in the United States District Court for the Southern District of Texas, seeking the return of the watercolors and the photographic archive or, in the alternative, money damages for their conversion. They proffered two bases for the government's waiver of sovereign immunity—the Federal Tort Claims Act (FTCA), 28 U.S.C. 2674, 2680(e) and (k), based on the tort of conversion, and the Little Tucker Act, 28 U.S.C. 1346(a)(2), based on a violation of an implied contract of bailment. See *Price* v. *United States*, 707 F. Supp. 1465, 1468-1473 (S.D. Tex. 1989), rev'd, 69 F.3d 46 (5th Cir. 1995).

The district court held, based on a tort theory, that the United States retained the properties for nearly 40 years in bailment for petitioners and wrongfully converted the properties in 1982 by refusing petitioners' request to return them. The court awarded petitioners nearly $8 million in damages. See *Price*, 69 F.3d at 49; C.A. App. 46 (docket entry 142).

3. The Court of Appeals for the Fifth Circuit reversed. *Price*, 69 F.3d at 49-54.[2]

The court of appeals held that it had subject-matter jurisdiction over the case, because petitioners were

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[2] The government filed simultaneous notices of appeal in the Fifth Circuit and the Federal Circuit, because it was uncertain whether the district court's decision had been based in whole or in part on the Little Tucker Act, 28 U.S.C. 1346(a)(2). After determining that the district court's decision had not been based on the Little Tucker Act, the government moved the Federal Circuit to stay its proceedings. The Federal Circuit dismissed the appeal without prejudice.

asserting only tort claims under the FTCA, and not contract claims under the Little Tucker Act. *Price*, 69 F.3d at 49-50. The court noted that, "[a]lthough [petitioners] pressed several theories of recovery in [the] original complaint, [petitioners'] position before us is that the United States converted the watercolors and archives when they refused [petitioners'] demands for their return in the early 1980s." *Id.* at 49.

The court of appeals dismissed with prejudice petitioners' conversion claim with respect to the watercolors. The court explained that the claim was based upon an alleged conversion that occurred in Germany. Accordingly, the court concluded that the claim was barred by 28 U.S.C. 2680(k), the "foreign country" exception to the FTCA's waiver of sovereign immunity. See *Price*, 69 F.3d at 50-52.

The court of appeals also dismissed with prejudice petitioners' claim with respect to the "vested" archive. The court explained that the Vesting Order was issued pursuant to the Trading with the Enemy Act. The court concluded that, because 28 U.S.C. 2680(e) provides an exception to the FTCA for acts and omissions of government employees under the Trading with the Enemy Act, petitioners' claim was "outside of the subject matter jurisdiction of the district court." The court observed that petitioners' exclusive remedy for the recovery of the "vested" archive was under the Trading with the Enemy Act, but that the two-year period for filing a claim under the Act had long since expired. See *Price*, 69 F.3d at 52-53.

On rehearing, the court of appeals dismissed without prejudice petitioners' claim with respect to the "missing," or "non-vested," archive because petitioners had failed to file an administrative claim under the FTCA. The court stated that all arguments with respect to that

archive could be considered in a separate suit by petitioners that was pending in the district court. See *Price*, 81 F.3d at 521.

Petitioners filed a petition for a writ of certiorari challenging the Fifth Circuit's decision. This Court denied the petition. *Price* v. *United States*, 519 U.S. 927 (1996).

4. Subsequently, in the separate suit, the district court concluded that Price's interest in the properties was based on an alleged assignment that was invalid under the Anti-Assignment Act, 31 U.S.C. 3727, because "Price was not the owner of the property at issue at the time the United States assumed possession and control." Pet. App. 54a. Accordingly, the court concluded that Price was not a proper plaintiff, and that venue was not proper in Texas. *Id.* at 55a-56a. The court dismissed Price, denied all remaining motions without prejudice, and transferred the case to the United States District Court for the District of Columbia. *Id.* at 56a, 57a.

5. After the transfer, the district court granted the government's motion for summary judgment in all respects relevant here. The court held that petitioners could not assert a claim under the Little Tucker Act, 28 U.S.C. 1346(a)(2), because no evidence had been presented of an implied-in-fact contract of bailment between petitioners and the government. Pet. App. 31a-37a. The court also held that petitioners could not assert a claim under the Takings Clause, because the Hoffmann heirs, as non-resident aliens, were not entitled to the protections of the Fifth Amendment in the circumstances presented here. *Id.* at 37a-39a. The court further held that petitioners had no basis for recovery under the FTCA or the Trading with the Enemy Act. *Id.* at 39a-48a. Subsequently, the court

entered judgment in favor of the government. *Id.* at 50a-51a.

6. The United States Court of Appeals for the Federal Circuit affirmed in substantial part. Pet. App. 5a-22a.[3]

The court of appeals declined to consider petitioners' challenge to Price's dismissal from the case because petitioners had failed to preserve the issue for appeal. The court explained that "[o]nce a motion to transfer has been granted and the action has been transferred, the losing party must make a motion to retransfer the case in the transferee district court in order to preserve the issue for appeal." Pet. App. 12a. The court noted that petitioners had made no such motion. *Id.* at 13a.

The court of appeals held that summary judgment was properly granted with respect to petitioners' claim under the Little Tucker Act that the government had breached an implied-in-fact contract of bailment with respect to the watercolors. Pet. App. 14a-16a. The court rejected petitioners' contention that the Army's conduct with respect to the watercolors demonstrated the existence of such a contract, observing that petitioners had failed "to allege that an official with authority actually bound the United States to return

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[3] The court of appeals concluded that it had subject-matter jurisdiction over the appeal, because petitioners had asserted claims under the Little Tucker Act as well as the FTCA. Pet. App. 11a-12a. Petitioners had filed notices of appeal to the Fifth Circuit, the District of Columbia Circuit, and the Federal Circuit, challenging the Texas district court's transfer order and the District of Columbia district court's summary judgment decision and final judgment. The Fifth Circuit dismissed the appeal. The District of Columbia Circuit stayed proceedings pending the disposition of the appeal in the Federal Circuit and then dismissed the appeal after the Federal Circuit issued its decision on rehearing.

the paintings." *Id.* at 15a. In addition, the court observed that the Army had returned other art belonging to the Hoffmanns at about the same time that the watercolors were confiscated, and concluded that such "divergent conduct indicates, if anything, an intent not to return the watercolors." *Id.* at 16a.

The court of appeals held that summary judgment was also proper with respect to petitioners' claim that the government had breached a contract of bailment with respect to the "vested" archive. The court reasoned that, even if such a contract was created, any claim based on it was barred under the Little Tucker Act's six-year statute of limitations, 28 U.S.C. 2401(a). Pet. App. 16a-18a. The court explained that "[a]ny bailment contract that might have been created with respect to the vested portion of the archive plainly was breached in 1951 by the vesting order." *Id.* at 17a. The court rejected petitioners' challenge to the validity of the Vesting Order, concluding that such a challenge was barred by the res judicata effect of the Fifth Circuit's decision. *Id.* at 18a.

Finally, with respect to the "missing" archive, the court of appeals found the facts sufficiently in dispute to preclude a summary judgment disposition. Pet. App. 19a-22a. The court observed that, even if an implied contract of bailment could be found to have existed, petitioners' claim appeared to be barred by the statute of limitations, and directed the district court to consider that issue on remand. *Id.* at 21a-22a. In denying the government's petition for rehearing, the court clarified that all of the government's defenses with respect to the "missing" archive were open for consideration on remand. See *id.* at 1a-3a.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and turns on the unique facts of this case. This Court declined to review an earlier version of this case. *Price* v. *United States*, 519 U.S. 927 (1996). The same result is warranted here.

1. Petitioners contend (Pet. 14-17) that the court of appeals erred in holding that the Hoffmann heirs, as non-resident aliens, could not assert a Takings Clause claim against the United States in the circumstances of this case. This Court has recognized, however, that Bill of Rights protections do not apply when the United States acts outside its territory with respect to aliens who have no connection to this country. See, *e.g.*, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) (Fourth Amendment does not apply to a search and seizure of property owned by a non-resident alien and located outside the United States); *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950) (Fifth Amendment right to due process does not apply to non-resident aliens arrested and imprisoned abroad). Nothing in this Court's decisions provides any reason to distinguish, as petitioners suggest (Pet. 15), between non-resident aliens' personal rights and property rights with respect to the extraterritorial application of the Bill of Rights.

Nor do this Court's decisions in *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952), and *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931), provide any support for petitioners. Those cases involved aliens and property with connections to the United States that are absent here. In *Guessefeldt*, the petitioner, although a German citizen, had lived in the United States for more than 50 years; the Court held that the mere fact that he

was detained in Germany while vacationing there at the outset of World War II did not prevent him from challenging a seizure of his property in the United States under the Trading with the Enemy Act. See 342 U.S. at 310-311, 320. In *Russian Volunteer Fleet*, the petitioner, through its predecessor in interest, had entered into a contract with a United States company for the construction of ships in the United States. See 282 U.S. at 487; Pet. Br. 2-3 in *Russian Volunteer Fleet*, *supra*. Thus, as the Court has explained, such cases "establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Verdugo-Urquidez*, 494 U.S. at 271. The Hoffmann heirs do not satisfy that description.

Petitioners attempt to avoid the distinction recognized in *Verdugo-Urquidez* between the rights of resident aliens and the rights of non-resident aliens by arguing (Pet. 15) that this case involves "property that is physically located within the United States." There is no reason, in law or logic, to conclude that the Hoffmann heirs, although non-resident aliens, became vested with constitutional rights merely because the properties, which the United States seized in Germany, were eventually transferred to the United States. See *Price*, 69 F.3d at 50-52 (recognizing that any conversion of the watercolors occurred in Germany); accord Pet. App. 15a-16a.

2. Petitioners next contend (Pet. 17-20) that the court of appeals erred in holding that the Little Tucker Act's six-year statute of limitations, 28 U.S.C. 2401(a), barred their claim to the "vested" archive because "a statute of limitations does not exist when a thief is in litigation over the stolen property with his victim."

Pet. 17 (capitalization omitted). Petitioners' argument rests on the erroneous premise that international law, specifically the "Hague Treaties," prohibited the United States from acquiring title to property seized in Germany during World War II.

In the first place, petitioners' argument cannot be reconciled with the Convention on the Settlement of Matters Arising Out of the War and the Occupation (Settlement Convention), Oct. 23, 1954, 6 U.S.T. 4411, T.I.A.S. No. 3425. In the Settlement Convention, Germany waived "claims of any kind" of its nationals "arising out of acts or omissions * * * which took place in respect of Germany, German nationals or German property" between June 5, 1945, and October 23, 1954. Gov't C.A. Addendum 22a (ch. 9, art. 3, para. 2 of Settlement Convention). The Settlement Convention supersedes any general principles of law on which petitioners purport to rely. Cf. *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976) (specific statute controls over general).

Moreover, the Settlement Convention and the Hague Treaties address different subjects. The Settlement Convention addresses the resolution of claims arising out of "actions taken or authorized" as a result of the "existence of a state of war in Europe" or the subsequent occupation. Gov't C.A. Addendum 21a-22a (ch. 9, arts. 1 and 3 of Settlement Convention). The Hague Treaties address the conduct of war. The Hague Treaties do not prescribe what arrangements two nations formerly at war with each other may agree to in establishing a new peacetime relationship.

Finally, petitioners are incorrect in characterizing the United States as a common "thief" with respect to the watercolors and the photographic archive. The United States, in acquiring those properties, was

making quintessential public policy decisions. The properties at issue were, and are, considered to be "Nazi Art," which the United States and its allies, pursuant to international agreements at the Yalta and Potsdam Conferences, determined should be confiscated in order to "denazify" Germany. See 3 Charles Bevans, *Treaties and Other International Agreements of the United States of America 1776-1949*, at 1005 (Yalta Conference), 1207 (Potsdam Conference). The United States' seizure of the properties fell within the scope of the Military Government Regulation implementing those international agreements. See Office of Military Government for the United States, *Military Government Regulations, Monuments, Fine Arts and Archives* § 18-401.6 (1947) (authorizing seizure of "[a]ll collections of works of art or other cultural objects the intent and purpose of which are the perpetuation of Militarism or Nazism"). The subsequent vesting of the photographic archive was the result of the same public policy judgments. See, *e.g.*, C.A. App. 1867-1868 (government letter of May 10, 1951, stating, *inter alia*, that the Hoffmann photographic archive fell within the purview of Potsdam Agreement and consequently should be vested).

3. Petitioners further contend (Pet. 21-25) that the court of appeals erred in holding that they had failed to challenge the Vesting Order, which was issued in 1951, within the two-year limitations period provided under the Trading with the Enemy Act. According to petitioners, the statute of limitations did not begin to run until 1989, when petitioners claim to have first learned of the Vesting Order. As the court of appeals concluded, however, petitioners' claim is barred by res judicata, because they had a "full and fair opportunity

to litigate th[e] exact issue in the first action" in the Fifth Circuit. Pet. App. 18a.

In any event, petitioners' contention (Pet. 25) that they did not learn of the Vesting Order until 1989 is factually incorrect. Henriette Hoffmann was told of the vesting in 1964. See C.A. App. 2207; see also C.A. App. 2205, 2211, 2265-2272. And, in 1983, the General Services Administration denied petitioners' request to return the photographic archive, stating that, pursuant to the Vesting Order, the United States owned the archive and the interests of all German nationals in the archive had been divested. See C.A. App. 2228-2229, 2245-2246, 2263-2264. Thus, even if the 1951 Federal Register notice of the Vesting Order were insufficient (which it was not), petitioners had only until 1985, at the latest, to file a challenge to the Vesting Order under the Trading with the Enemy Act. They failed to do so.

Moreover, petitioners, as "enemies" of the United States under the Trading with the Enemy Act at the time that the properties were seized and vested, are not entitled to challenge the Vesting Order. See 50 U.S.C. App. 9(a) (allowing suit for recovery of assets seized under the Act by "[a]ny person not an enemy or ally of [an] enemy"); *Uebersee Finanz-Korporation, A.G.* v. *McGrath*, 343 U.S. 205 (1952); see also *N.V. Handelsbureau La Mola* v. *Kennedy*, 299 F.2d 923, 926-927 (D.C. Cir.) (enemy status of Germany nationals did not end until Oct. 19, 1951), cert. denied, 370 U.S. 940 (1962).

Finally, even if petitioners could challenge the Vesting Order, the challenge would fail on the merits. Petitioners suggest (Pet. 21-22) that no vesting order could validly have issued with respect to German property after January 1, 1947, when trade resumed between Germany and the United States. That argument

cannot be reconciled with the relevant statutory authority. Under the Trading with the Enemy Act, enemy property may be vested in the United States "[d]uring the time of war," 50 U.S.C. App. 5(b)(1)—a period beginning at "midnight ending the day on which Congress has declared or shall declare war" and ending on "the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date," 50 U.S.C. App. 2(c). Although there is still no treaty of peace with Germany, Congress passed the Termination of the State of War Between the United States and Germany on October 19, 1951, providing that:

> any property or interest which prior to January 1, 1947, *was subject to vesting* * * *, *or which has heretofore been vested* or seized under [the Trading with the Enemy Act] * * * *shall continue to be subject to the provisions of that Act* in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest.

H.R.J. Res. 289, 82d Cong., 1st Sess., 65 Stat. 451 (1951) (emphasis added). Thus, property vested before the termination of war on October 19, 1951—which includes property subject to the Vesting Order at issue here, which was dated May 31, 1951—was validly vested.[4]

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[4] Contrary to petitioners' assertion (Pet. 21), vesting authority applies to property both inside and outside the boundaries of the United States. See *Cities Serv. Co.* v. *McGrath*, 342 U.S. 330, 333 (1952) (vesting of debentures physically located outside the United

4. Petitioners finally contend (Pet. 25-27) that the court of appeals denied them due process by declining to review on the merits the Texas district court's dismissal of Price as a plaintiff. No reason exists to disturb the court of appeals' case-specific holding that petitioners failed to preserve their challenge to the dismissal order.

In any event, the district court correctly held that the Anti-Assignment Act, 31 U.S.C. 3727, barred Price from becoming a plaintiff in the case. The Act prohibits any "transfer or assignment of any part of a claim against the United States Government or of an interest in the claim," 31 U.S.C. 3727(a)(1), and provides that "[a]n assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." 31 U.S.C. 3727(b). In short, only the equivalent of a judgment may be assigned, *not*, as here, the potential for a judgment.

It makes no difference whether, as petitioners argued below, the Hoffmann heirs made an assignment of property to Price, as opposed to an assignment of their claims against the United States. This Court has recognized that the Anti-Assignment Act applies to claims by a person who acquires property after a claim against the government arose. See *United States* v. *Shannon*, 342 U.S. 288 (1952) (Anti-Assignment Act prevented plaintiffs, who purchased property damaged by the United States Army, from pursuing previous owners' FTCA claim).

5. This case does not warrant the Court's review for a final reason. All of petitioners' claims with respect to

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States fell within the "broad terms" of the Attorney General's vesting authority under the Trading with the Enemy Act).

the watercolors and the "vested" archive are barred on additional grounds not reached by the court of appeals. Accordingly, even if the Court were to review and reverse any of the court of appeals' rulings, the ultimate outcome of the case would be the same.

First, petitioners' claims are barred under the doctrine of res judicata, or claim preclusion, because they were raised, or could have been raised, in the prior proceeding in the Fifth Circuit. As this Court has explained, "[r]es judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979).[5]

Second, petitioners' claims are also barred by the Settlement Convention between the United States and Germany. As noted above (at 10), the Settlement Convention waives German nationals' "claims of any kind" against the United States for "acts or omissions * * * in respect of Germany, Germany nationals or Germany property" that occurred between June 5, 1945, and October 23, 1954. Gov't C.A. Addendum 22a (ch. 9, art.

---

[5] Petitioners cannot avoid the application of claim preclusion on the ground that the Fifth Circuit could not have exercised appellate jurisdiction over claims under the Little Tucker Act. Petitioners invoked the Little Tucker Act in the original case in district court. If petitioners had continued to rely on the Little Tucker Act on appeal, the district court's judgment would have been reviewable in the Federal Circuit, rather than the Fifth Circuit. See *United States* v. *Hohri*, 482 U.S. 64, 75-76 (1987). Petitioners, however, explicitly informed the Fifth Circuit that they were pressing only FTCA claims. See *Price*, 69 F.3d at 50 ("[t]he parties are in agreement that only 28 U.S.C. § 1346(b) [the FTCA] could have provided a basis for subject matter jurisdiction in this case").

3, para. 2 of Settlement Convention); see *id.* at 21a (ch. 9, art. 1 of Settlement Convention) (waiving claims arising between September 1, 1939, and June 5, 1945). Accordingly, as the United States informed an attorney for Heinrich Hoffmann, Jr., in 1956, return of the properties to the Hoffmann heirs could occur only though "diplomatic channels." Pet. App. 21a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2002

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No. 01-1111

IN THE

Supreme Court of the United States

ROBERT H. HOFFMANN, HEIDEMARIE KRÜGER, SUSANNE HUSTÄDT, ESTATE OF HENRIETTE HOFFMANN VON SCHIRACH, DR. KLAUS VON SCHIRACH, EXECUTOR, and BILLY F. PRICE,

Petitioners,

v.

UNITED STATES and JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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Section 20 of the RESTATEMENT (SECOND) OF JUDGMENTS (1980) 3

Pursuant to Rule 15.6, Petitioners hereby reply to new points raised in the Brief in Opposition filed by the United States ("the government"):

Point 1. *Res Judicata*

The government argues that petitioners' claims are barred by res judicata, because of the decision of the Fifth Circuit in the 1983 Case. (Opp. 15). In its opinion the Fifth Circuit dismissed petitioners' complaint in the 1983 Case as to both the watercolors and the photographs because the district court lacked subject matter jurisdiction. As to the watercolors, the court concluded that petitioners' tort claim arose in Germany and that 28 U.S.C. § 2680(k) explicitly excludes such claims from actionable FTCA claims. As to the photographs, the court concluded that petitioners' complaint was filed prematurely, before the FTCA claims were on file with the government for the required six months. The Fifth Circuit thus dismissed the complaint for lack of subject matter jurisdiction, characterizing the dismissals as being "with prejudice." (*See* Opp. 4 & 7, where the same statements are made).

Notwithstanding the Fifth Circuit's characterization, as a matter of law the dismissals could not and did not result in adjudications on the merits, and the Fifth Circuit's opinion thus could not have res judicata effect. In *Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272, 1279 (1983), the Seventh Circuit stated the undisputed controlling legal principle (citations omitted):

> Once a court expresses the view that it lacks jurisdiction, the court thereafter does not have the power to rule on any other matter. Any finding

> made by a court when the court has determined that it does not have subject matter jurisdiction carries no res judicata consequences.

There is no dispute as to this legal principle in the Fifth Circuit, a fact which that court overlooked in its 1996 opinion in the 1983 Case. *In re Camp*, 59 F.3d 548, 550-51 (5th Cir. 1995) (judgment by court lacking subject matter jurisdiction has no res judicata effect). Nor is this principle disputed in the other federal courts: Petitioners' brief in the district court in the instant case (pp. 145-146) cited *Costello v. United States*, 365 U.S. 265, 284-286 (1961), and 11 appellate court decisions that support the proposition that dismissals for lack of subject matter jurisdiction are not adjudications on the merits.

Rule 41(b), RULES OF CIVIL PROCEDURE, is consistent with this case law. That Rule does not use the phrases "with prejudice" or "without prejudice," but rather relies on "adjudication upon the merits" to indicate when a dismissal has res judicata effect. Rule 41(b) states that dismissals for lack of jurisdiction, venue or failure to join a party are not adjudications upon the merits.

In the 1983 Case, the Fifth Circuit did not state that it was effecting "an adjudication upon the merits" as to any of petitioners' claims. When it stated that the dismissals as to the watercolors and vested photographs were "with prejudice," as a matter of law such dismissals were not adjudications upon the merits and had no res judicata effect that would preclude all other causes of action based on the underlying facts.

Section 20 of the RESTATEMENT (SECOND) OF JUDGMENTS (1980), is in accord. Comment "d" states that, under FED. R. CIV. P. 41(b), courts may not dismiss claims for lack of jurisdiction with prejudice.

Further, even if any statements made by the Fifth Circuit are thought to characterize the dismissal of the 1983 Case as an adjudication on the merits, such would be *obiter dicta*. *Pegues v. Morehouse Parish School Bd.*, 706 F.2d 735, 738 (5th Cir. 1983). For this reason, use of the words "with prejudice" in describing the dismissal does not preclude a finding by another court that the dismissal had no res judicata effect. *Charchenko v. City of Stillwater*, 47 F.3d 981, 985 (8th Cir. 1995) (judgment recited that claims were dismissed "with prejudice"; *held*, dismissal for lack of subject matter jurisdiction has no res judicata effect); *Pueblo de Taos v. Archuleta*, 64 F.2d 807, 812 (10th Cir. 1933) (use of the words "with prejudice" in a judgment does not enlarge the effect of a judgment as res judicata if the record indicates that it was not an adjudication on the merits). *See Owen v. United States*, 20 Cl. Ct. 574, 575 n.1. (1990); *Landsberg v. Scrabble Crossword Game Players, Inc.*, 802 F.2d 1193, 1197 (9th Cir. 1986).

Further, the instant case was filed in 1989, raising all of the non-FTCA claims for the explicit purpose of litigating same in the event the Fifth Circuit held that the S.D. Tex. had no FTCA subject matter jurisdiction in the 1983 Case. This case was carefully held in abeyance for six years until the Fifth Circuit, in 1996, dismissed the 1983 Case for want of subject matter jurisdiction.

Point 2. *1954 Treaty*

The government argues that the Convention on Settlement of Matters Arising Out of the War and the Occupation signed October 23, 1954, 6 U.S.T. 4411, T.I.A.S. No. 3425 (1954) (the "1954 Treaty") bars petitioners' claims in this case. (Opp. 15-16). Such argument (a) mischaracterizes petitioners' cause of action as a complaint about the Army taking custody and control in May 1945 of the watercolors and the photographs, (b) expands the 1954 Treaty beyond its language, (c) conflicts with other treaties binding upon the United States, and (d) ignores the government's failure to introduce any evidence supporting the factual underpinnings of application of the 1954 Treaty.

The 1954 Treaty contains two provisions that might be applicable. First, Article 1 of Chapter IX provides:

> Without prejudice to the terms of a peace settlement with Germany, *German nationals* who are subject to the jurisdiction of the Federal Republic *shall not assert* against countries which have signed or acceded to the United Nations Declaration of 1 January 1942, or have been at war with Germany, or are specified in Article 5 of Chapter 5 of the present Convention, or against the nationals of such countries, *claims of any description arising out of actions taken or authorized by the Governments of these countries between 1 September 1939 and 5 June 1945 because of the existence of a state of war in Europe*, nor shall such claims be asserted in any court of the Federal Republic by any person. [Emphasis added.]

Then, Article 3 of Chapter IX provides (6 U.S.T. at 4504-5):

* * *

> 2. The Federal Republic recognizes that *no claims of any kind arising out of acts or omissions* of the Three Powers or any of them or of organizations or persons who have acted on their behalf or under their authority, which took place in respect of Germany, German nationals or German property, or in Germany, *between 5 June 1945 and the entry into force of the present Convention, may be asserted by the Federal Republic or by persons subject to its jurisdiction* against the Three Powers or any one of them or against organizations or persons who have acted on their behalf or under their authority. [Emphasis added.]

These provisions of the 1954 Treaty are inapplicable, because petitioners are asserting neither:

> (a) claims of any description arising out of actions taken [by the Allies] . . . between 1 September 1939 and 5 June 1945 because of the existence of a state of war in Europe under Article 1, nor
>
> (b) claims for acts or omissions [tort claims] against any one of the occupying powers for events that occurred between June 5, 1945 and 1954.

Petitioners do not base their claims of ownership of the watercolors or photographs on anything that occurred

between 1939 and 1954 or that "arose" from actions during the dates specified in the treaty. Petitioners' claims "arose" as a result of their ownership of property, and the denial in 1983 of their right to possession of such property by the United States. No complaint is made of any event during the period from September 1, 1939 until 1983 (other than the FTCA tort of conspiracy that occurred in the United States in 1951 to have a "vesting order" signed as to some of the photographs). In fact, if the government had not taken lawful control and possession of the watercolors and photographs under the Hague Conventions, just as it did millions of other valuable artworks, and safeguarded all of these properties at the end of the war, the watercolors and photographs, and artworks belonging to thousands of other people, likely would have been stolen by looters and lost forever. For these reasons alone, the 1954 Treaty is inapplicable.

The United States is a party to the Hague Conventions, the relevant portions of which are (Hague Convention Respecting the Laws and Customs of War on Land, 36 Stat. 227, 1 Bevans 631 (1907)):

> Article 46. Family honour and rights, the lives of persons, and *private property*, as well as religious convictions and practice, *must be respected.*
>
> *Private property cannot be confiscated.*
>
> Article 47. *Pillage is formally forbidden.*
>
> * * *
>
> Article 56. The property of municipalities, that of institutions dedicated to religion, charity and

> education, the arts and sciences, even when State property, shall be treated as private property.
>
> *All seizure of*, destruction or willful damage done to institutions of this character, historic monuments, *works of art and science, is forbidden, and should be made the subject of legal proceedings*. (Emphasis added.)

These provisions, when read with other provisions of the Hague Conventions, make it clear that confiscation of private property is forbidden, but seizure of private property for use is permitted, subject to the fiduciary mandate of accounting for, returning and paying compensation.

The foregoing provisions make it quite clear that under no circumstances can there have been any adverse taking of the watercolors or photographs unless during the war the taking was accomplished because of military necessity. Here, the Army's taking control of the watercolors and photographs was well *after* the hostilities and fighting had ended in May 1945. Certainly, the government introduced no factual support to the contrary.

The government's argument seems to be that the 1954 Treaty precludes claims of any type brought by German plaintiffs after World War II. This interpretation ignores the limiting language "because of the existence of a state of war" and "authorized by the Governments of these countries." Thus, even if petitioners were complaining of the May 1945 taking, the government has offered no proof that the Army's taking custody of the watercolors and photographs occurred "because of the existence of a state of war" and was authorized by the Governments, so the 1954 Treaty cannot bar those claims.

The Treaty must be restricted to what it was obviously intended to govern. For example, a German armament factory owner would be precluded from making claims against the United States for bombs dropped on his factory during the course of the war, and claims for damage or destruction of hotels, private homes and property of all kind during the bombing and battles of the war would be precluded. And if a German national were working in New York in 1953 and is run over by a negligently-operated United States mail truck, that person's tort claim could not be affected by the treaty. Likewise, the lawful taking of possession by the United States of paintings or photographs prior to June 1, 1945 could only be the subject of claims, if after a reasonable period, the United States did not abide by its Hague Convention obligations and account for, return and compensate the owner for use by the United States of the chattels. The 1954 Treaty was intended to apply to a limited range of circumstances and must be confined to those circumstances.

Having said this, it is important to remember that petitioners did not have any claims in May of 1945 or anytime thereafter, until 1983. Petitioners' ancestors were the owners of the four watercolors and the photographs. The United States is not the owner. The taking of possession and control of these properties in Germany in May 1945 by the United States was for the altruistic purpose of returning the watercolors to their true owners and for using the photographs for prosecution of war crimes and for intelligence purposes. Under the Hague Conventions, there was no adverse taking. Rather, there was a taking custody or control or seizure (all words of art in the Hague Conventions) in a fiduciary capacity. The government cannot contort the facts to imply that a state of war existed on the dates of the taking in fiduciary capacity. Most importantly, the government offered

no evidence to demonstrate such facts. Thus, even assuming petitioners were complaining of events during the period covered by the 1954 Treaty, the government has no immunity from suit because the 1954 Treaty is inapplicable.

Point 3. *New Facts*

In its opposition, the government makes many grossly erroneous statements of fact:

a. "the four watercolors were acquired by Hoffmann from Hitler" and that Hoffmann was Hitler's "personal photographer." (Opp. 2). The record shows that Hoffmann was a photographer, not Hitler's personal photographer, who purchased three of the watercolors on the market, having received one as a gift from Hitler on Hoffmann's 50th birthday.

b. "The watercolors were transferred to the U.S. in 1945." (Opp 2). The record shows that the watercolors were held in Munich after 1945 for four years awaiting a claim from an owner, and in 1949, no owner having appeared, were transferred from Munich to Wiesbaden when the Munich facility was closed. Thereafter, an Army colonel toured the Wiesbaden facility and "picked up" the watercolors for "additions to the Army's collection." They were seized under the Hague Conventions in 1950 and shipped to the United States to be placed in an Army museum after that date.

c. "The photographic archive was used during the Nürnberg trials and in 1951 the Office of Alien Property vested ownership of the archive in the Attorney General." (Opp. 2). The record shows that about 20% of the photographs were in Nürnberg and the Army commander promised that such 20% would be returned to Hoffmann Jr, who was

recognized as the owner by the Army. But upon a 1949 command from Virginia, the 20% was seized under the Hague Convention and shipped to the United States for use in writing books about the war. Once the 20% arrived in Virginia, an Army general wrote that a "vesting order" should be signed as to those photographs in order to "strengthen the Army's legal hold" on the photographs. The remaining 80% of the photographs were turned over by the Army to the O.S.S. (now the CIA), intelligence branches of the Army and the Signal Corps and transported by them to the United States. No vesting order was signed as to the 80%.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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